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INTRODUCTION

SINCE the publication of the first volume, the British Year Book of International Law has been affiliated to the British Institute of International Affairs.

The members of the Editorial Committee do not make themselves in any way responsible for the views expressed by the writers of the articles, whether those articles are signed or unsigned. The Committee are only concerned to see that the articles are worthy contributions to the science of International Law.

The promoters of the Year Book are glad to state that the reception of the first volume was such as to justify them in issuing this second volume; but they desire to repeat that the Year Book must depend for its continuance on the copies which are sold to the public, and they therefore beg that all those to whom the idea of the Year Book appeals will support it by becoming subscribers and will do what they can to increase its circulation.

October 1921.

CONTENTS

THE JURISDICTION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

By SIR H. ERLE RICHARDS, K.C.S.I., K.C.,
Chichele Professor of International Law and Diplomacy in the University of Oxford.

THERE are two points of real difficulty about the powers which it is proposed to confer on the permanent Court of Justice. The first is whether the Court is to have compulsory jurisdiction, that is, whether one party to a dispute is to be able to obtain a summons to his opponent to appear before the Court, and to obtain judgment in his absence if that party refuses to obey the summons. If the Court has no power to issue a compulsory summons of that kind, and to give effect to it, as against a litigant who objects or refuses to appear, then the Court, whatever its title, is in substance little more than a Court of Arbitration. It will have this advantage over the Courts which have from time to time been constituted under the arbitration provisions of the Hague Convention, that it will have a higher status, that it will be permanently in session and will require no special action by the parties to bring it into being. It will have this disadvantage, that the parties will have no voice in the selection of the judges, and may, for one reason or another, be indisposed to entrust the matter to the decision of the particular judges on the rota for the time being. But there is a possibility of development in a permanent tribunal which justifies the experiment even if the definite result of the change be for the moment but a small one. And involved in this question is the second point, namely, the binding effect of the judgments delivered. If they are to be regarded as authoritative expositions of international law binding on all nations, then great difficulties must arise in practice in the conditions which exist at the present time. If, on the other hand, the decisions are to have no force except in regard to the particular case, then again the Court falls back to the position of a tribunal of arbitration. And it is of little use to discuss the machinery or

procedure of the proposed Court until these initial points are settled. The conception of a great International Court declaring and expounding the law of nations to the civilised world appeals to the imagination of every one of us; but ideals, however attractive and however stimulating, cannot be imposed with success on a world which is not ready to receive them. They must come by growth and development, and must be assured of general acceptance when they come, else they are doomed to fail, and the whole movement from which they have resulted must suffer a disastrous check. Therefore it is necessary to get back to practical considerations, and to decide whether the times are ripe for compulsory reference to an International Court, and for conferring on such a Court the power to expound the law authoritatively for all nations. This is a question of opinion. The Committee of Jurists to whom the matter was referred by the League of Nations were in favour of progress on both points. The League itself has taken the opposite view. The purpose of the present note is to submit some considerations on these differences of opinion.

From this general point of view it is not necessary to go into the question, closely and acutely examined elsewhere in this Year Book,[1] as to whether the Covenant of the League is based on the assumption of compulsory reference. The wording is not altogether free from ambiguity, but the fact is manifest that a considerable number of parties to the contract never intended Articles 12, 13 and 14 to be read in that sense.

In brief, the conclusion submitted is that no reference to a Court can be made compulsory until the law of nations is defined with greater exactness. The application of ascertained and recognised law is a task which within limits may properly be entrusted to jurists, but the determination of the law in cases in which the usage of different nations is not uniform, and indeed on some points is directly opposed, and as to which no settled principles have as yet found acceptance, is a task beyond the competence of a judicial tribunal. Such differences must be settled by international agreement before they can be dealt with by a judicial process. Take the familiar illustration of the laws of war at sea. Here we are confronted with questions of vital importance to nations, involving for some of them issues not only of victory or defeat in war, but of their very national

[1] pp. 6–26 *infra*.

existence. But every student knows that there never has been anything like complete agreement as to the respective rights of belligerents and neutrals in maritime warfare. On some points, it is true, the law has been defined by convention or become settled by usage, but on many points, and some of the highest importance, the difference of opinion between nations has hitherto proved irreconcilable. These differences depend on policy rather than on principle, and can only be composed by agreement. Attempts have been made from time to time to this end, but so far with but limited success. The Declaration of Paris covers only a small field. The Declaration of London, even if it had been ratified by the belligerent Powers in the late war, was admittedly incomplete; and on the matters with which it did purport to deal would have proved both ineffective and unpractical. At least that is the conclusion that is submitted as the result of some practical experience in the Prize Courts of one of the belligerents during the late war. And maritime warfare is not the only subject on which difference exists. There are many other topics as to which the law is undetermined.

It may be possible some day to agree upon the law, and if real agreement is reached, then it should be possible to codify the law with sufficient exactness to enable a Court to apply it according to judicial methods. But until that is done the objection to compulsory reference seems insuperable. It has been observed that there must be real agreement; for the Conventions of the Hague and of London deal with many points on which divergent opinions have never been really reconciled. An ambiguous phrase is introduced which leaves both contentions open, or some qualifying words are used which rob the statement of the law in the main provision of all effectiveness. These devices of ingenious draftsmen facilitate the acceptance of conventions, but they solve no difficulties and are certain to fall to pieces the moment they are tested in practice.

It is perhaps because of these doubts that nations have hitherto insisted on having their own representatives on the Bench. If the Court were an impartial tribunal administering ascertained law, there could be no valid reason for such a claim; it is because in the conditions which exist to-day an International Court must have some power of making the law, as distinct from expounding it, that such a claim becomes reasonable, and is insisted on. In the case of Courts administering municipal

law the conditions are different. There, the principles on which the Court must act are already well established, and the application of them may properly be left to judges. There may be other difficulties in the way of compulsory reference, but this particular objection arises at the outset and goes to the root of the whole proposal.

For the same sort of reason there is grave objection to investing an International Court with the power of pronouncing decisions binding in future cases. Litigation between two particular States may raise questions of international law affecting all other nations in a greater or less degree. There is power in the Tribunal, under Article 62 of the proposed statute, to admit third States as interveners, but it is obvious that this cannot be done generally, or the sittings of the Court would be interminable and the parties to the particular litigation would suffer delay and incur expenses amounting almost to a denial of justice. But if all other States are not admitted to intervene, the consequences become impossible. Take again as an illustration a case arising on the law of maritime warfare. There is litigation, shall we say, between Costa Rica and Switzerland, and it happens that the material issue involves the determination of some questions of general importance as to the rights of belligerents at sea. Are the great sea Powers of the world to be bound by a decision arrived at in their absence in litigation between States which have but small interests at stake in the determination of such a question? The statute as approved by the League attempts to meet the difficulty by declaring that the judgment of the International Court shall have no binding force except between the parties and in respect of that particular case (Art. 59), and that seems the only possible solution for the present.

For these reasons, if for no others, it is submitted that any agreement to refer disputes compulsorily to a tribunal with a fixed rota of judges, or to make the judgments of the tribunal binding as exposition of the law, is premature. Some smaller States may agree to a general arbitration treaty in the future, as a few have done in the past, but the great States are not likely to be persuaded to tie their hands in this way in present conditions. The habit of arbitration before some tribunal is growing, and will grow, and no effort should be spared to foster that habit until it attain the force of a custom and later of an

obligation. And keeping pace with that advance there will be, as we hope and as we must endeavour to secure, a more complete agreement on the principles of law. So that this joint progress may in time lead to the acceptance of a Court with compulsory powers which will provide a substitute for force in disputes between States, just as litigation has taken the place of combat in the quarrels of individuals, and which will enunciate the law in a series of considered judgments. But the growth must be gradual. To force the growth is to risk the destruction of it.

To suggest limitations of the jurisdiction of the Court in the first instance involves no opposition to the proposal to set up a Court of Nations. Whatever the objection to conferring the widest powers on the proposed Court at the outset, there can be no doubt that the institution of an International Tribunal must ultimately make for peace. It may begin with limited powers, but as confidence in it increases, wider powers are certain to accrue, and the high status and position of a permanent Court are sure to attract international litigation.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND COMPULSORY JURISDICTION

By Dr. B. C. J. LODER,
Judge of the Supreme Court of the Netherlands.

A SUFFICIENT number of States have ratified the convention which was drafted at Geneva with the object of creating the Permanent Court of International Justice. The Assembly and Council are now able to appoint the members of this body and the long-expected World Tribunal may soon commence its labours.

It is a very old and familiar idea that anarchy among nations should be removed by the establishment of some judicial means of settling disputes. But what in former times could not advance beyond the uttering of *pia vota* or the drafting of plans by philosophers, was seriously attempted by both the Hague Conferences at the instance of certain nations. It is unnecessary to repeat for the readers of this Year Book what these Conferences have done. It is only necessary to remind them that in 1907 the attempt to create, in addition to the Permanent Court of Arbitration, a Permanent Court of Arbitral Justice, failed, because of the divergence of opinion among the States as to the composition of this Court. Mutual distrust amongst the nations prevented the establishment of a tribunal that could be founded only upon mutual trust.

While this distrust continued no progress could be made beyond the establishment of a Permanent Court of Arbitration. Nevertheless a step forward may be said to have been taken by the Hague Convention in two respects, firstly, that according to it the judges need not always be chosen *pro re nata*, and secondly, that the former method of proceeding in arbitration, by mediation and accommodation, was to be replaced by a strict dispensation of justice.

But there was still granted no compulsory jurisdiction by which it was possible for a party to litigate against its opponent, even without the latter's consent, and independently of conditions laid down by the defendant. For the fulfilment of

arbitration agreements is only possible with the co-operation of both parties. In case of refusal an obligatory arbitration treaty remains a dead letter. Hence the concluding of a treaty is by itself an insufficient means of guaranteeing that justice shall be obtainable.

The aspect of the matter, however, changed when the war was concluded by the Peace Treaty. This treaty opens with the Covenant of the League of Nations, applicable not only to the parties that had been involved in the war, but also to States which had kept aloof from it, but which were invited to become parties to the Covenant. There was, in fact, nothing left to these but to accept the proposal. The States not mentioned in the Annex were to be admitted into the League after having satisfied certain conditions.

This League was conceived primarily as a means of avoiding war in the future. The possibility of war could not be entirely excluded, but precautions were devised to reduce it to a minimum. And, as the most efficient means to this end, it was decided to bring into being a permanent court of international justice. It was of course to be expected that, in the future, disputes would arise between States, as they do between private persons. For settling these in an amicable way a scheme of conciliation had already been devised and formulated. But, after all, most disputes in the world are of a juridical nature. Parties ask for rigorous justice. They assert that they have a right to receive what they ask for. They are accustomed to base their rights upon the *law;* accordingly, henceforth there was to be an organ of the League itself, an impartial and independent body of judges that would provide the world with what was asked for.

Was the world thinking again of mere *Arbitration?* Would it gain anything if in the future the Permanent Court should be unable to dispense justice unless the parties by virtue of conventions should have recourse to it, having formulated their disputes by themselves? If compulsory jurisdiction were not the intention of those who created the League of Nations and proposed the Permanent Court in order that this object should be attained, what was the practical use of creating such a Court, which would probably be repeatedly passed over by parties to disputes?

The Articles of the Covenant of the League of Nations on the subject of the Permanent Court, in fact, show that it really

was intended to take the important step of making the jurisdiction of the Court obligatory. It is true that Articles 13–15, regulating the matter, do not establish it clearly; but the Treaty of Peace itself has in different places prescribed the obligatory jurisdiction of the Court, *e.g.* in disputes concerning labour, transit and so on. And the only Article relating to the *Court* (Art. 14) speaks of *international justice*, whilst the term "arbitration," used everywhere else, is not to be found therein.

The opinion that obligatory jurisdiction, in whatever way expressed, was indeed the intention of the Covenant, is, moreover, supported by the fact that, although it was not possible in 1907 to agree about the composition of the Court, nevertheless, the forty-four States then meeting in Conference unanimously declared :—

1. That they accepted the principle of obligatory jurisdiction.

2. That certain disputes, especially those which related to the interpretation and application of international agreements, should be submitted to obligatory jurisdiction without any limitation whatsoever.

It can hardly be supposed that those principles, unanimously accepted in 1907 by forty-four States, would again be abandoned at a moment when the whole world was clamouring for security of law.

What, then, are the regulations of the Covenant, in which the matter is defined, and what is their meaning? Article 12 reads thus :—

"The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council."

But it is clear that the matter regulated in this Article has nothing to do with the Permanent Court. It may or may not be correct that the supposed dispute between the States is of a juridical nature; the main point in the Article is the political element. It supposes there is a danger of a *rupture* between some States. If such a case arise, then the States are obliged to choose one of two courses. They can put the matter into the hands either of the arbitrators or of the Council, and they are

bound to refrain from war till at least three months after the report of the Council or the award of the arbitrators. There is therefore no question of a "judgment" or a "decision," nor of a "Court." The word "arbitration" in this Article is therefore used in its strictly technical sense; it implies law binding on the Members of the League. It lies, however, outside the scope of these pages.

Article 15 deals with and regulates the case when the dispute is submitted to the Council. Why it does not immediately follow Article 12 is not clear. That it indeed further amplifies this latter Article, is evident from the opening words: "If there should arise between Members of the League any dispute likely to lead to a rupture," which are exactly the same as those of Article 12. It continues: "which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council." This is the second clause of Article 12. What the figure 13 means here, it is impossible to say, as only the case of Article 12 is being dealt with. If not a clerical error, this is certainly a strange mistake. The Article now sets out in detail what the Council may or must do. It can, *e. g.* refer the matter to the Assembly. The last paragraph again calls to mind Article 12.

The Court therefore is kept out of the matter altogether. The only Articles remaining to be considered are 13 and 14. Article 13 again gives the Members an obligatory ruling, but at the same time is satisfied with vague terms which allow of various interpretations.

"The Members of the League *agree* that whenever any dispute shall arise between them which they recognise to be *suitable* for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration."

So here enters *diplomacy* as the first means of conciliation. What is to happen if the parties do not "recognise the dispute as suitable for arbitration," is not apparent.

The Article mentions a few cases which are "generally suitable for arbitration," but leaves the matter in uncertainty. But the third paragraph tells us what this Court of Arbitration is, to which the case will be submitted, if arbitration is decided upon. "For the consideration of any such dispute the Court of Arbitration to which the case is referred shall be

the Court agreed on by the parties to the dispute or stipulated in any convention existing between them."

This Court of Arbitration which the parties agree upon is not the "Permanent Court of International Justice" mentioned in the next Article. If it were, then it would have been called by this name. It is again a real Court of *Arbitration*, elected by the parties, whether on the occasion of the dispute or "in any convention existing between them." Therefore, Articles 12, 13 and 15, speaking of "arbitration," all use the word in the true technical sense. They speak of a body of arbitrators chosen by the parties themselves—an *ad hoc* body. The Article concludes with an injunction to the Members to carry out the award and not to resort to war against the party which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto. The relation between Articles 12 and 15 on the one hand, and Article 13 on the other, has perhaps not been very carefully considered. The first of these presupposes a dispute likely to lead to a rupture, and then gives parties the choice between arbitration and the Council. The second one presupposes a less serious dispute and prescribes: first, diplomatic mediation; if that fails, arbitration—that is, if the parties consider the dispute suitable for submission to arbitration. The Article does not say what is to happen if the dispute is considered not to be suitable.

Thus far there is no question of a Court of Justice. Those who connect Article 13 with Article 14 maintain that the word "arbitration" does not stand in the way, because arbitration is being used in the strictly technical sense of administering justice through arbitrators, that is to say, administration of justice in general by an established body. This is quite true, and it is not necessary to attach too much importance to the actual words of the Covenant. But from what precedes it is clear that the argument does not rest upon that word, but must be inferred from the whole contents of the Articles.

Now let us consider Article 14. It consists of three sentences. The first one reads:—

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

Nothing more is said about the Court itself. The two follow-

ing sentences deal with the competency to be assigned to the Court in matters which, from their proper nature, do not belong to the task of the Court. It is, therefore, necessary to say something about this point.

The Members of the League then will have before them for acceptance something which the Council proposes to them, that is to say, a "Permanent Court of International Justice." These five words adequately express what they mean to convey. An organ of the League is being created. That organ shall be a permanent institution, a regular Court of Justice, identical with similar national State institutions. Those arraigned before it have nothing to do with the choice of the judges; the judges are there. Nor have they anything to dictate concerning the rules according to which justice shall be administered. The competency and the law to be applied are subjects which are defined in the Statute. They belong to the plans to be drafted by the Council. The essential characteristic of *arbitration* is lacking.

In the second place, the Court will be *permanent*. This word has its historical meaning. It implies that the Court is to have that attribute which the Hague Arbitration Court lacks. That, it is true, is adorned with the name "Permanent," but wrongly so, for it is *never* permanent. There is certainly in existence a long list of persons forming part of it, but out of this list the parties together are first to select their judges. These are summoned from far and wide in order to arbitrate upon this one particular matter. The Court of Justice, however, will *always be there*. At stated times it will hold its sittings. It will always be accessible with its permanent staff. The Hague Arbitration Court will still exist, but the Permanent Court of Justice will co-exist as a separate body. It will be a Court of Justice: its task will be, in the first place, to settle disputes of a juridical nature. There was a desire in the world that justice should be obtainable, and for that reason the organ was created. Its members are *judges*, not amiable *compositeurs*. And that part of the law which is international will be assigned to the Court. Now, if the Covenant contains nothing regarding the nature of that Court except the clause quoted above, whence can be deduced that "compulsory jurisdiction"? The words "compulsory jurisdiction" mean that the plaintiff can summon the defending party without previous agreement between the two, even *against*

the latter's will, and the Court is, therefore, competent and even bound to adjudicate, whether the offending party puts in an appearance or not.

The answer to *that* question is given in the very name "Court of Justice." The peculiar characteristic of a Court of Justice, in contrast with one of arbitration, is that the competency of the judges is not derived from the voluntary agreement of the disputing parties, but from elsewhere. The world complained that such an institute of justice between nations was lacking. In view of the above-mentioned unanimous resolutions at the Peace Conference of 1907, the time appeared ripe for its creation.

Hence it is from the very nature of the Court itself that the compulsory jurisdiction is derived.

Its adversaries, however, deny this right of unilateral citation on the ground of the words of the Article itself. Does it not speak of "disputes which the *parties* submit to it"? That is, both parties; thus evidently a matter of agreement and not a unilateral one. The interpretation of these words seems to be correct, but not the conclusion.

As explained above—and it will hereafter be made clearer, both from the drafts and from the ultimate wording of the Statute of the Court—the proper task, the ordinary business of the Court, is the same as that of any Court, *i. e.* the adjudication of disputes of a juridical nature. Article 14 of the Covenant, however, assigns to the Court, in addition, two other functions which fall outside its proper task. They are expressed in the second and third sentences. The last sentence makes the Court into an advisory body to the Assembly and the Council. The second sentence confers upon the Court power of jurisdiction in all cases submitted to it, and consequently also in those which are *not* of a juridical nature, provided they bear an international character. Then, however, the parties are jointly, *i. e.* by virtue of agreement, to ask the Court for a decision. This second sentence reads :—

"The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."

It is unnecessary to argue that for *these* disputes, which may be disputes of a non-juridical or of a political character, an agreement is needed in order that they may be admitted to the Court.

In these cases the Court will be able to decide only if the parties appear jointly and bring their dispute properly circumscribed before the Court. For this category of disputes the Court is virtually no longer a Court of Justice, but a Court of Arbitration. This definition, therefore, decides nothing about the question whether the Court, when and so long as it performs its functions simply as a Court of Justice, is or is not competent in a case of unilateral citation. It is evident that a Court which will have to adjudicate between sovereign, and, therefore independent, States, needs a title upon which its judicature is based, and that this title will be no other than agreement. This agreement is the League of Nations itself. It is the League that has proposed calling the Court into being, that has stipulated its threefold activity, and has commissioned its own organs to work out and adopt the necessary plans. To join the League is, therefore, at the same time to recognise the competency of the Court. Why, then, is in every dispute a special agreement to be made, if that dispute falls within the ordinary province of the Court? States not belonging to the League would be excluded from admittance to the Court, as the Court itself, for lack of jurisdiction over them, would not be able to give them hearing. The Statute itself, however, has made suitable provision to this end. The arrangement has been unanimously sanctioned by the Assembly and has received binding force by virtue of a duly ratified Convention between all the States forming part of the League.

A Conference of the neutral States — Sweden, Norway, Denmark, Switzerland and the Netherlands—assembled at the Hague in February 1920, guided by the principles explained above, had formulated Articles 21, 22 and 24 of their draft. The threefold task that Article 14 of the Covenant entrusted to the Court and defined therein was devised by this Conference. In the first place, the jurisdiction proper with regard to disputes of a juridical nature without special agreement. As corresponding to this character the Conference embodied in their Article:—

(*a*) The enumeration of the disputes given in Article 13 of the Covenant as "generally suitable for submission to arbitration."

(*b*) Jurisdiction not included therein, but then only by virtue of agreement.

(*c*) Apart from that, the Court as an advisory body.

The Conference formulated these points as follows :—

Art. 21. La Cour est compétente de juger les membres de la Société des Nations, sans leur assentiment préalable pour les différends relatifs à :—

(*a*) L'interprétation d'un traité.

(*b*) Tout point de droit international.

(*c*) La réalité de tout fait qui, s'il était établi, constituerait la rupture d'un engagement international.

(*d*) L'étendue ou la nature de la réparation due pour la rupture d'un engagement international.

(*e*) L'interprétation d'une sentence rendue par la Cour.

Art. 22. 1. En outre, la Court connaît de tous les différends d'un caractère international pour lesquels les parties, qu'elles soient membres de la Société des Nations ou non, s'accordent de reconnaître sa compétence.

2. Cet accord est considéré comme établi :—

(*a*) Lorsque les parties, par un traité général, se sont engagés à soumettre à la Cour tous les différends ou certains catégories de différends survenus entre elles. Si le traité général réserve les différends sur les intérêts vitaux, l'indépendance ou l'honneur, ce sont les parties qui jugent de l'applicabilité de ses réserves à moins que le traité soumette cette décision à la Cour.

(*b*) Lorsque les parties par un accord spécial dans un cas déterminé, conviennent de soumettre un différend à la décision de la Cour.

Art. 24. La Cour donne des avis consultatifs sur tout différend ou tout point, dont la saisit le Conseil ou l'Assemblée de la Société des Nations.

In preparation of the task conferred upon it by Article 14 of the Covenant, the Council appointed a Committee of ten Jurists from different countries, in order to draft a scheme for the Statute of the Court.

This Advisory Committee of Jurists assembled in June–July, 1920, also at the Hague. It followed practically the same line, but sought at the same time contact with Article 13 of the Covenant. It conceded the right of unilateral citation of the members, but only after the requirements of Article 13 should appear to have been satisfied.

The Court itself was to judge whether this had been the case. This formed their Article 33. It is true Article 13 of the Covenant did not prompt them to this; but it cannot be denied that in most cases the measure would work well. After this preliminary provision it was laid down, in the first place in Article 34, that the Court, without special Convention, should decide what was within its proper domain as a Court of Justice, *i.e.* should decide what was of a "juridical nature." Consequently, they

adopted the enumeration of Article 13 of the Covenant. Then followed the jurisdiction in disputes of any kind which may be submitted to it by a general or particular Convention between the parties.

Article 36 dealt with the Court as an advisory body.

Articles 33 and 34 read :—

Art. 33. " When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall first of all decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Article.

Art. 34. " Between States which are Members of the League of Nations the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature concerning :—

(*a*) The interpretation of a treaty.

(*b*) Any question of international law.

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation.

(*d*) The nature or extent of reparation to be made for the breach of an international obligation.

(*e*) The interpretation of a sentence passed by the Court.

" The Court shall also take cognizance of all disputes of any kind which may be submitted to it by a general or a particular convention between the parties.

" In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by the decision of the Court."

The train of thought of the ten concerning the relation between Articles 13 and 14 of the Covenant was outlined as follows by Mr. James Brown Scott, who, with Mr. Elihu Root, attended the deliberations :—

" With but one dissenting voice the Committee was of opinion that a State belonging to the League of Nations should, on its own initiative, be able to summon another State, also belonging to the League, before the Permanent International Court of Justice, to litigate a juridical question concerning the subject mentioned in Art. 34.

" The ground upon which this opinion was based is that, by Art. 13 of the Covenant, the Members of the League agree ' that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration '; that the four categories of disputes classified under *a*, *b*, *c* and *d*, ' and declared by Art. 13 to be among those which are generally suitable for submission to arbitration,' and that the interpretation of the judgment of the Court is a question which the

parties to the second Hague Conference had agreed in case of difference to submit to the tribunal deciding it. In the opinion of the majority of the Committee, the Members of the League between and among themselves are either bound by their acceptance of Arts. 13 and 14 of the Covenant to submit disputes of this category to arbitration (used in a non-technical sense as including judicial settlement), or by agreeing to the present Article, which is a general consent to suit on the part of the States accepting it, so that a separate and special convention between the parties to this effect is unnecessary. On this theory the parties would not need to *consent* to submit a specific dispute, as each would be *bound* to do so. Therefore it would seem to follow that one of the parties could, in the absence of a separate and special convention or of special consent, lay the case before the Court which is competent to receive it, and that the Court, being competent, could not only entertain the case, but could, at the request of the complaining State, proceed to decide it in the absence of the defending State invited to appear before the Court." [1]

It appears from the above that the argument is not quite sound. The different meanings of the word "arbitration," the purely technical, and the more general one, play an important part in this argument. Nevertheless the formulation of the Articles met with agreement, because, after all, Article 33 did nothing else but demand two preliminary requirements which, though not prescribed by the Covenant, were certainly most useful; subsequently it would be possible to make use of the unilateral citation.

It is of importance to enter into the history of the draft.

When the Committee of Jurists met at the Hague, the Secretariat-General presented it with a Memorandum which was to guide it in its work. Added to this was an Appendix dealing with: (*a*) the juridical interpretation of the terms "Court of Justice" and "Arbitration"; (*b*) the history of Articles 13 and 14 of the Covenant. This Appendix was followed by Annexes A–L, consisting of quotations and preliminary draft schemes. Under (*a*) was indicated the difference in character between "arbitration" and "justice."

It mentioned as characteristics of arbitration the appointment of judges by the parties themselves, the definition by these judges of the actual rules which shall guide them, and the purely voluntary character of this jurisdiction.

There are, however, as well, *intermediate forms* between "justice" proper and "arbitration."

One thing, indeed, continually created confusion, viz. the use

[1] *Report and Commentary*, by James Brown Scott, published by the Carnegie Endowment, Washington, 1920, p. 98.

of the word "arbitration," which was sometimes meant to be arbitration in its strictly technical sense as indicated above, and then again in the general sense, embracing all jurisdiction. This confusion was, according to the Appendix, not avoided in the Articles which are at present under review. But this confusion of terms also leads to confusion of ideas.

The stimulus for creating a Permanent Court of International Justice is to be found in the criticism of the so-called Permanent Court of Arbitration at the Hague, which is neither a Court nor permanent, and which too often substitutes mediation for "judicial sentence."

The name of this new Court and its regulations are intended to convey that here indeed is meant a regular Court, created to decide, as its ordinary task, questions of a juridical nature. The second sentence shows that the Court also shall act in matters of a different nature—but then only as an arbiter—if the parties agree to appear together before the Court; and the third sentence indicates the advisory character of the Court.

In legal disputes the Court would thus be acting as an ordinary Court before which one summons one's adversary.

The question, however, is whether this can be deduced from the history of Article 14. This point has become *the* great controversy. It was dealt with in part B of the Annex.

As far as can be made out from the official documents, it appears that in the beginning little account was taken of the result to be attained. The original British and American drafts did not seem to have in view a real Permanent Court of Justice.

The first draft in which such a Court appeared was that of January 20, 1919. There it is spoken of as an Arbitration Court, a "Court of International Law," destined to decide in disputes brought before it by the Council, which body also formulates the points on which the Court is to adjudicate. This Court would have to cede its place to the Permanent Court of Justice.

The second draft scheme, which served as the base of discussion, is that of February 3, 1919. After some modifications this was adopted on February 14, 1919, and this scheme was laid before the Conference of neutrals on March 20 and 21 following. The French and English texts, although apparently meaning the same, chose different modes of expression, always a dangerous procedure where contracts or legal clauses are concerned. The English text reads :—

Art. 13. "The High Contracting Parties agree, that whenever any dispute or difficulty shall arise between them which they recognise to be suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration. For this purpose the Court of Arbitration to which the case is referred shall be the Court agreed on by the parties or stipulated in any convention existing between them. The High Contracting Parties agree that they will carry out in full good faith any award that may be rendered. In the event of any failure to carry out the award, the Executive Council shall propose what steps can best be taken to give effect thereto."

Art. 14. "The Executive Council shall formulate plans for the establishment of a permanent Court of International Justice, and this Court shall, when established, be competent to hear and determine any matter which the parties recognise as suitable for submitting to it for arbitration under the foregoing Article."

What then is here the meaning of arbitration—the narrow, technical one, or the broad one? If the technical one—the French having "*d'être arbitré*," and not "*jugé*"—where is the specific difference between "Court of *Arbitration*" and "Court of *Justice*"? What was meant by "arbitration under the foregoing Article"? What was the relation between the two Articles? We can but guess.

At the Conference of the neutrals all sorts of grievances against the provisions were brought forward. A promise was given to consider these, and the result of the consideration was communicated later. Concerning this draft, the answer read as follows :—

Arts. 13, 14 and 15. "The proposals made by the neutral Powers on these Articles, with the object of emphasising the element of judicial justice, and diminishing the political element and the settlement of disputes by the League, were sympathetically considered by the Committee.

"The Commission had already decided against obligatory arbitration, and it was not possible for it to reverse this decision. It decided, however, on the following changes, which will at least give partial satisfaction to those who attach a special importance to the juridical organisation of the League.

"These changes are :—

"(1) In Art. 13 a definition of cases which the parties recognise to be 'justiciable' is to be introduced.

"(2) A provision is to be introduced into Art. 14 enabling the body of delegates or the Executive Council to refer any dispute to the Permanent Court of International Justice for a judicial opinion. It may fairly be expected that this latter provision will help to promote recourse to law as a normal procedure in international affairs."

The Council satisfied the desire under (1), but then in the

new published text the word "generally" suddenly appeared, and hence what had just been gained could not be relied upon.

As regards the second point, a simple addition was expected, but this was not what occurred. The whole Article was changed. The end, it is true, did read as promised, but the first sentence was omitted; the provision was altered and an entirely new element was introduced.

It was the Executive Council which was to establish a plan, but the Council which had taken its place was to *draft* one, and this was to be *proposed* to the Members of the League.

Nothing was said about the Court itself. While in the previous wording, linking up Articles 13 and 14, one could ask what the words really meant, this was now impossible. The ultimate text demolished every bridge between 13 and 14, and no mention was made of 13. The wording differs. There is no longer any question of chosen judges or of arbitration in the technical sense.

On the one hand arbitration is spoken of, and on the other a body to dispense justice, which body is definitely provided for in a fixed Statute. Then a second clause, of which no trace can be found in the previous wording, lays down that the Court may also take cognisance of, and decide upon, every dispute of an international character which the parties shall submit to it. This is, therefore, the arbitral, apart from the judicial function. The explanation given in the Memorandum of the Secretariat-General was the same. Finally follows the *rôle* as advisory body. What happened? Nobody knows.

So much is certain, that henceforward the Covenant is only to be judged by what it says itself.

With this new and latest text the five neutrals set to work, with this text also the Committee of Jurists had to reckon.

What else could they see than that at last was given what the world had been asking for so long?

The ten jurists, nevertheless, retained the connection with Article 13 in the sense that Mr. James Brown Scott, as related above, had explained. They still linked up the unilateral citation, that is to say, the compulsory jurisdiction, with a previous agreement, but they considered participation in the League as in itself a sufficient agreement.

In the Council Meeting in 1920 at Brussels, a few weeks before the meeting at Geneva, the Council cancelled Articles 33 and

34 of the draft scheme. The principal cause of this was probably the note lodged with the Council by Mr. Balfour, in which the point of view of the British Cabinet was communicated.

The following extract from this Note may find a place here :—

"The British Cabinet fully recognise the importance of providing a permanent Tribunal without delay. The duty has been formally thrown upon the League of Nations by the Covenant, and unquestionably the Council of the League will find it difficult or impossible to carry out all the functions entrusted to it without the existence of such a body. At the same time, there are obviously difficulties in accepting the scheme proposed by the jurists without modifications of some importance. The first observation I have to make is that the scheme with all its methods goes considerably beyond the Covenant. Art. 14 (by which the Council is directed to formulate and to submit to the League the plans of the Permanent Court) clearly contemplates: (*a*) that the Court has only to deal with disputes which are voluntarily submitted to it by the authorities concerned, and (*b*) that it has to give an advisory opinion on any dispute or question which the Council or Assembly may choose to submit to it. Evidently, the framers of the Articles never intended that one party to the dispute should compel another party to go before the Tribunal; and this omission cannot have been a matter of choice, since the subject of compulsory arbitration has been before the legal authorities of the whole world now for many years. It has more than once been brought up for practical decision, and has always been rejected."

Article 14 then *would* "clearly contemplate that the Court was only to deal with disputes which are voluntarily submitted to it by the authorities concerned." And thus the idea of "obligatory jurisdiction" would have been rejected. From the above history of the Article the opposite is to be concluded, and the declaration with respect to that, already unanimously adopted in 1907 by forty-four States, has grown to a *communis opinio*.

The Council followed the advice of England. The grounds for its own judgment are more broadly stated, so as to give an opportunity for discussion.

Its report contains the following :—

"1. *Obligatory Character of the Jurisdiction.*

"This is a question of the interpretation of Art. 34 of the scheme of the Hague Jurisconsults. This Article runs as follows :—

"Between States Members of the League of Nations, the Court will, without special Convention, decide disputes of a judicial nature which concern :—

"(*a*) The interpretation of a Treaty.

"(*b*) Any point in International Law.

"(*c*) Any fact, which if it were established would constitute a violation of international agreement.

"(*d*) The nature or extent of the reparations due for the violation of an international agreement.

"(*e*) The interpretation of a sentence pronounced by the Court.

"The Court will also deal with all disputes, of whatever nature, which are submitted to it as the result of a Convention, whether general or special, between the parties.

"In case of doubt as to whether a dispute comes within the categories mentioned above, the Court shall decide.

"No difficulty arises when there exists between the parties a general or special Convention declaring the Court to be competent. But it remains to be decided whether we can set up a Court of Justice entitled to consider itself competent to give a decision where no special Convention exists. The Jurists at the Hague decided in the affirmative. They considered, in fact, that if the Court is made competent by agreement between the parties—a fact which is incontestable—it is difficult to see why this agreement should not be established by a general Convention after discussion by the League of Nations, instead of by a special Convention arrived at by two or more parties.

"If the Assembly of the League of Nations approves of provisions which establish a Court of Justice, and which imply that the competence of this Court in certain matters is binding on all, would not the ratification by the different States of these provisions adopted by the League of Nations be equivalent to a Convention, giving to the Court of Justice a compulsory jurisdiction in matters mentioned in Art. 34 of the draft scheme?

"If this view, advanced by the Jurisconsults at the Hague, is adopted without modification, a considerable advance has certainly been made, in view of the terms of Art. 34. What must be understood, then, by the expression 'any point of international law'? Even if the States admitted the compulsory jurisdiction in the cases definitely laid down in the Article, will they consent to go so far as to admit that any question of international law may be submitted to the Court? Objections of this nature have been raised by several Governments, which have forwarded us their remarks on the draft scheme.

"The innovation involved in the Hague scheme may be summed up as follows:—

"The decision of the Permanent Court is being substituted for the decision which the Council should take on the question whether diplomatic methods of settlement have, or have not, been exhausted between the two parties before their dispute comes before the Council, and a decision of the Permanent Court is substituted for the free choice allowed to the parties by the Covenant with regard to the question whether they shall lay their dispute before the Court, before another international Tribunal, or before the Council of the League of Nations.

"This freedom of choice is given to Members of the League of Nations by Art. 12 of the Covenant."

The Committee of Jurists was reproached for having exceeded and infringed the Covenant. This reproach is certainly unmerited for the reasons already stated.

Articles 12 and 15, as well as Article 13, give, as the mode of

solution of the disputes referred to, partly reference to the Council and arbitration, partly diplomatic negotiations and arbitration; and the connection existing in the previous schemes between Articles 13 and 14 was cut away in the last and definitive wording. This Committee, however, rendered due homage to Articles 12, 13 and 15 by opening the way to obligatory jurisdiction, but only after having exhausted the means dealt with in these Articles.

But this is not all. The report itself reads something into these Articles that is not there. It sets out from the opinion that it is the *Council* which has to decide whether or not the diplomatic methods of settlement have been exhausted before the parties approach the Court. Not only does the Covenant say nothing about this, but it is contrary to all principles of jurisdiction that a Court should not be allowed to examine whether the conditions entitling one to litigate have been satisfied. Further, the parties would have been deprived of the free choice of appearing before the Court, thus assigning to the Court itself the power of deciding for them. This is even in direct conflict with the contents of the cancelled Articles. This choice, it is alleged, was given by Article 12 of the Covenant, whereas in that Article there is no question of a decision by the Court. It makes, nevertheless, an agreeable impression to learn from the continuation of the report that :—

> "The Council does not in any way wish to declare itself opposed to the actual idea of the compulsory jurisdiction of the Court in questions of a judicial nature. This is the development of the authority of the Court of Justice which may be extremely useful in effecting the general settlement of disputes between nations, and the Council would certainly have no objection to the consideration of the problem at some future date."

On these lines, then, Mr. Balfour spoke at Geneva. When from many quarters obligatory jurisdiction, and even the re-establishment of the wording of the jurists, was frequently and forcefully advocated, he pointed out that the opposition against the inclusion of obligatory jurisdiction at this juncture was not based upon principle, but upon caution. England had always championed in word and deed the establishment of such a Court. So far as he was concerned, opposition was certainly not to be suspected. But every new institution needs growth and development. Once the Court is in operation and shows that it fulfils expectations, it will acquire the confidence and goodwill of the

whole world. What is prematurely desired will one day come as a natural thing. Too great haste can only do irreparable damage.

Who can deny that sober reason, as well as statesmanship, is at the back of these words? It must be acknowledged that it is difficult for a great Power to be bound by the decision of a judge whom it does not know personally, and whom it has not chosen for a definite dispute. The weak side, however, of this argument is that to wait for the right moment may easily lead to deferring it for ever. Would it not, at any rate, have been better to have let this argument of practical politics stand by itself alone from the beginning, instead of adducing grounds derived from the Covenant that cannot bear the test, and could only lead—and did in fact lead—to sharp opposition?

In October, 1920, in place of the rejected Articles of the Committee of Jurists, the Council proposed the following:—

Art. 33. "The jurisdiction of the Court is defined by Arts. 12, 13 and 14 of the Covenant.

"Art. 34. Without prejudice to the right of the parties, according to Art. 12 of the Covenant, to submit disputes between them either to the judicial settlement or arbitration or to inquiry by the Council, the Court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by treaties in force entrusted to it or to the Tribunal instituted by the League of Nations."

The Third Committee of the Assembly, to which the consideration of the institution of the Court was referred, did not maintain these Articles. Rightly so, for the first contained nothing, and the second hid its emptiness under a great show of words. The Third Commission had as its task to examine the whole draft scheme. This it did with great diligence and devotion, and in doing so avoided any fundamental change.

Compulsory jurisdiction was hotly debated. If it had been possible to work with majorities, undoubtedly a large majority, both in the Committee and in the Assembly, would have been found for accepting compulsory jurisdiction as a general rule. It was, however, thought that unanimity was required for the acceptance of the Statute of the Court. Rightly so, for the establishment of a world institution, such as the Court was intended to be, can only be successful if it is supported by general sympathy; especially a Court whose judgments cannot be executed in the ordinary way. General respect and confidence

in its members and its verdicts is the condition of its existence and effectiveness. Apart from the juridical considerations concerning the form that was to be chosen for its establishment, it was essential to try to find a way that could be followed by everybody. To accomplish this was the difficult task of the Third Committee. First of all, it would have been a mistake to maintain Articles such as these, which said nothing. Clarity and honesty are indispensable for success, and nothing is gained by putting off problems of present importance.

Although on the one hand it was perceived that the opposition of the Council to the proposal of the Committee of Jurists should be respected, on the other hand it would not do to overlook the wishes of the great majority, for they saw in compulsory jurisdiction the only guarantee of enforcing justice. The condition for a satisfactory solution was to find a compromise between these two views.

The honour of having found this is due to the delegate from Brazil, Señor Fernandes, one of the ten jurists, a man as sagacious as he is energetic. To cast this solution into a form acceptable to everybody was the task of the sub-Commission of the Third Committee.

Everything is now embodied in a new Article (36), reading:—

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

"The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is joined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation with any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:—

"(*a*) The interpretation of a treaty.

"(*b*) Any question of international law.

"(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation.

"(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

"The declaration referred to above may be made unconditionally, or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The first clause lays down that submission by the parties, that is to say, joint submission, makes the Court competent in

"all cases," juridical or non-juridical. Further, the Court is competent in those cases which by virtue of treaties and conventions (Versailles and others) "are brought before the Court, and which, therefore, already in part contain compulsory jurisdiction." The remainder of the Article deals with certain categories of legal disputes, and lays down in respect of them that, in a Protocol to which the Statute is joined, the Members of the League and the States mentioned in the Annex may declare that they recognise the jurisdiction for these categories as *ipso facto* compulsory, with all such modalities as the Article indicates.

Obligatory jurisdiction, therefore, has herewith made an entrance, but only for those who desire it. Everybody has agreed to this. How could it be otherwise? Some States immediately availed themselves of the opportunity of signing the additional Protocol. A few, mindful of Mr. Balfour's warning, accepted this declaration as binding for five years only. If disappointed, they are free again after that time.

The Great Nations will probably hold aloof. Will this attitude persist? This, indeed, depends upon the future, not only upon the way in which the Court will fulfil its task, but also upon other circumstances, especially political ones.

It has been predicted that the result of the solution which was found will be that the Powers of second rank will submit and that the Great Powers will persist in their isolation. This may be, but it should not be forgotten that the medal has its obverse: those who cannot be summoned cannot summon, and they remain dependent upon the benevolent co-operation of their adversaries. Besides, the matter looks more serious than it is in reality. Intercourse between States will take place as between private persons. The appeal to the judge is generally not the first, but the last step taken to arrive at a settlement. Even those who are not bound by the signing of the additional Protocol will find that the gates of the Court are not entered by a party in search of justice unless the ways of diplomatic negotiation and arbitration have been closed. The opponents further lose sight of the point that many slight disputes of a simple nature arise, in which cases rapid and cheap litigation is desirable. These will be best and most easily settled before a judicial body that is indeed permanent and conversant with jurisdiction, and this will naturally be cheaper than arbitration can ever be.

Finally, if one asks whether the advocates of compulsory jurisdiction must be disappointed and discontented because they have not immediately obtained what they had expected, then the answer must be in the negative.

There does not seem to be any doubt that the future will bring compulsory jurisdiction between States. For a rapid and regular development of international law the time is, however, not favourable—a time in which both the political and the economic life of the nations is still disturbed and minds are still filled with hatred and ideas of domination. That time will slowly pass by. The normal intercourse between nations will return when favourable economic conditions are restored. It will be realised, more than ever before, how much the nations are inter-dependent for their well-being. It will be seen that law, rapid and cheap, among nations, assists progress, as it does among private individuals. Great nations will see that bluster and threats will be of no avail, and that they are impeded by rigid confinement within their own conceptions of sovereignty. It will be realised that all this belongs to an obsolete world-order. This will all the more easily be recognised when there have been gained some years of experience in the new mutual relations between nations, relations which have been created by the institution of the League of Nations, and which gradually will come to further development.

No one can arrest time. What must come will come. It will do the Court no harm if, in the first years of its existence, it knows it has to make a reputation. One need not be an idealist to believe that what has been achieved may satisfy all parties. In this poor world good things find their way only if they are at the same time practical.[1]

[1] As we go to press the names of the Members appointed to serve on the International Court are announced. They are: Judges—Altamira (Spain), Anzilotti (Italy), Barbosa (Brazil), de Bustamente (Cuba), Viscount Finlay (Great Britain), Huber (Switzerland), Loder (The Netherlands), J. B. Moore (United States of America), Nyholm (Denmark), Oda (Japan), Weiss (France). Deputy Judges—Negulesco (Roumania), Wang (China), Yovanovitch (Jugo-Slavia), Beichmann (Norway).

SUBMARINE CABLES AND INTERNATIONAL LAW

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I

An important question involving principles of international law, as to which there are few, if any, generally accepted rules, was raised during the Peace Conference at Paris in 1919 in relation to the disposal of the German-owned submarine cables. Some of these had been cut early in the war, and lifted and relaid; the points raised involved the questions whether such cables were liable to be treated as prize or booty of war and whether their retention by the victors by way of reparation was in accordance with international law. These questions as regards the cables under consideration are now chiefly of academic interest, though they are by no means unimportant for the future. The Treaty of Versailles [1] settles the matter in the following way :—

"Germany renounces on her own behalf, and on behalf of her nationals in favour of the Principal Allied and Associated Powers all rights, titles or privileges, of whatever nature in the submarine cables set out below, or any portions thereof." [Here follows a list of the cables,[2] with their description, which may shortly be summarised as follows: Emden-Vigo, Emden-Brest, Emden-Teneriffe, Emden-Azores, Emden-New York, Teneriffe-Monrovia, Monrovia-Lome, Lome-Duala, Monrovia-Pernambuco, Constantinople-Constanza, Yap-Shanghai, Yap-Guam, Yap-Menado.]

"The values of the above-mentioned cables or portions thereof, in so far as they are privately owned, calculated on the base of the original cost, less a suitable allowance for depreciation, shall be credited to Germany in the reparation account."

The cables, therefore, so far as they are State-owned, are confiscated to the Principal Allied and Associated Powers,

[1] Part VIII. Annex VII.
[2] These cables have a total length of over 21,000 miles.

namely, the British Empire, the United States, France, Italy and Japan; but in so far as they are privately owned, their value forms part of the reparation for which Germany is to receive credit from these Powers. It is believed that this is the first time that cables have been thus dealt with in a Peace Treaty. A conference was held at Washington at the end of 1920 at which the allocation of these cables was discussed, but it ended without a final decision being reached, and the recent Note addressed to the Powers by Mr. Hughes, the United States Secretary of State, on the subject of the grant of the Mandate of the Island of Yap to Japan, and the correspondence between the United States and Japanese Governments, prove that the difficulties connected with the allocation still await solution. Yap, though an insignificant member of the Pellew group of islands in the Pacific, which was sold by Spain to Germany in 1889, is an important cable centre whence radiate cables connecting it with Shanghai, Guam (a possession of the United States), and Menado in Celebes (a Dutch possession).

II

The British public had early grasped the importance of the cable as a means of linking up the world-wide Empire, and of furthering its commerce; in 1897, when British companies owned some 190,000 miles of cables, France owned 19,000, Germany 2000 and Japan 1250.[1] It was about this time that Germany began to plan a cable policy and proceeded to free herself from the necessity of sending messages to the United States through England, and to dispute the British hegemony in every part of the world where her interests were involved. Cables were to be used not only as a part of the German machinery for acquiring a widespread empire, but as an aid to obtaining a position of economic and political influence in quarters where the acquisition of territorial possessions was for the time being impossible.

The encouragement of the formation of private companies for works of public utility was, to a great extent, a means of concealing the true inwardness of this imperialist policy, and this concealment was further assisted by the association of foreigners in the enterprises, as was done in the case of the foundation

[1] *Annuaire de l'Institut de Droit International*, 1902, p. 313.

of the Deutsch-Niederländische Telegraphengesellschaft. Other undertakings of a similar character might be referred to.

The companies were in form international, but were in fact controlled by Germans in the interest of the national policy.[1] In February, 1899, was founded the Deutsch-Atlantische Telegraphengesellschaft for the laying of the North Atlantic cable, and in May of the same year the firm of Felten & Guilleaume (which since 1853 had made telegraph cables), with the assistance of the Deutsch-Atlantische Co., founded the Norddeutsche Seekabelwerke A. G., for the making and laying of submarine cables; this company played a great part in the execution of the German cable policy.[2] The firm of Felten & Guilleaume, the Norddeutsche Seekabelwerke A. G., and the other cable companies above named, were all closely interrelated, several of the directors being on the management of all of them, they were also equally closely related to a banking house in Cologne, which city was the headquarters of all these undertakings.

When the war broke out in 1914, these cables were all in the hands of Germans working in the interest of the State, and their value for strategic and propaganda purposes cannot be overestimated. Some of them were cut at sea by the Allies and portions were relaid under conditions of extraordinary difficulty. The Emden-Teneriffe cable was partially diverted into St. Nazaire, the rest of the cable being used to connect Brest with Casablanca; and the Teneriffe-Monrovia cable was diverted so as to connect Morocco with Senegal. Something like 1200 miles of cable were lifted in very deep water, and relaid by one English company.[3] On general principles of international law there would appear to have been a strong case for the confiscation of some, if not all, of the German cables by the captors. The Treaty adopted a middle course, whereby the making of peace was facilitated.

[1] I am indebted for this account of the German cables and the policy of the German Government to the work of M. Charles Lesage, *Les cables sous-marins allemands* (1915, Paris).

[2] Other companies were founded in 1899, 1901 and 1908 for the purpose of laying the Constanza-Constantinople, South American and Far Eastern cables.

[3] An interesting account of the diversion of these cables was given by Major L. Darwin at a meeting of "The India-rubber, Gutta-percha and Telegraph Works, Ltd.," *The Times* (Company Meetings), December 19th, 1919.

III

When we turn to the question of what are the rules of international law dealing with the treatment of cables in time of war, we are met with the difficulty that there do not appear to be any very clearly ascertainable. There are certain principles relating to the laws of war at sea as between belligerents, and other principles which affect belligerents and neutrals, which are in the main due to compromise between the conflicting claims of the two.

The only international convention relating to the treatment of cables in war, as between belligerents, is Article 54 of the Regulations attached to the Fourth Hague Convention, 1907, which states that:—

> "Submarine cables connecting an occupied territory with a neutral one shall not be seized or destroyed except in case of absolute necessity; they must also be restored and the indemnities regulated at the peace."

This applies only to the case of land warfare where one belligerent occupies the territory of his adversary and seizes or destroys the landing ends of the cables connecting the territory with a neutral State.

The International Convention for the Protection of Submarine Telegraph Cables, of 1884, expressly states that freedom of action is reserved to belligerents (Art. 15). The Institute of International Law has discussed the subject on two occasions and formulated proposals for their treatment, but the discussions revealed considerable differences of opinion.[1] This was only to be expected, as the rights of belligerents and the interests of neutrals are in conflict in these matters. At the meeting of the Institute at Brussels in 1879, it was agreed that "submarine cables uniting two neutral territories are inviolable." It was also agreed that it was desirable, where telegraphic communications had to cease by reason of war, that the cessation should be limited strictly to the prevention of the user of the cable, and that this should be stopped as soon as the cessation of hostilities allowed. It was at Brussels in 1902 that the subject was again discussed, and a more elaborate set of resolutions was adopted. According to these a cable connecting two neutral territories is inviolable. A cable connecting the territories of the belligerents,

[1] *Annuaire*, Vols. III. and IV. pp. 351–94; Vol. XIX. pp. 301–32.

or parts of the territory of one of the belligerents, may be cut anywhere, except in neutral waters. A cable connecting a belligerent and neutral State may not be cut in neutral territorial waters; it cannot be cut in the high seas unless there is an effective blockade, and then only within the limits of the line of blockade, and subject to the duty of re-establishing the cable as soon as possible; it can always be cut in enemy territorial waters.* There was a difference of opinion as to restricting the cutting of this class of cable to the limits of a blockade. Dr. Perels took his stand on the exigencies of war; he admitted the desirability of the maintenance of free communication between neutrals and belligerents, but urged that it was impossible to sacrifice the interests of belligerents. Professor Westlake supports the view taken by the majority of the members of the Institute, and says :—

"A neutral may legitimately resent any such cutting of a cable in which he is interested, so long as no rules permitting it have received his assent, or have become a part of international law in the regular progress of its development." [1]

The views held by most naval authorities to-day on the subject of blockade render such a limitation as that proposed impracticable. The Institute further laid down the principle that the liberty of a neutral State to send dispatches does not imply the power of using the cable, or of permitting it to be used, to render aid to one of the belligerents. In the application of the foregoing rules it was also stated that no difference was to be made between State-owned and privately owned cables, or between cables which were enemy-owned and those owned by neutrals.

Judging some of these rules by the stern demands of war, the truth of Dr. Perels' observation that the members of the Institute could propose what they liked, but the question was what governments could adopt, becomes evident.

The topic was discussed on several occasions by a body in close touch with the realities of war, the United States Naval College. Articles on the matter were contained in the United States Naval War Code of 1900 (Art. 5), and Professor George Grafton Wilson delivered lectures at the College in 1901,[2] and the College discussed the subject in 1902 and 1903.[3] The

[1] J. Westlake, *International Law*, (1913, Cambridge University Press), Part II. p. 118.

[2] *Submarine Telegraphic Cables in their International Relations* (1901, Washington).

[3] *International Law Situations* (1902, Washington), p. 7; 1903, p. 27.

views of the Institute of International Law were not wholly acceptable to the War College. Under the provisions of the United States Naval War Code, cables connecting different parts of the enemy territory were to be dealt with as warlike necessities required, but cables connecting neutral and belligerent territory were held to be liable to interruption "within the territorial jurisdiction of the enemy," thus following the proposals of the Institute of International Law. The provisions of this Code were fully discussed in 1903, and the War College recommended that in the case of all cables, irrespective of their ownership, satisfactory censorship should be provided, except where they were otherwise exempt; the treatment of cables between parts of the enemy State, or connecting the belligerent States, laid down in the Code was approved; interruption of cables between an enemy State and a neutral State was approved "outside of neutral jurisdiction" (*i. e.* on the high seas or in belligerent territorial waters) "if the necessities of war require"; but cables between two neutral States were to be inviolable, and free from interruption. It was also recommended that the whole question of the treatment of cables in time of war should be referred to an international conference for settlement. The Code was withdrawn in 1904, but the changes proposed by the War College are set forth in Article 40 of the Instructions for the Navy of the United States governing maritime warfare issued on June 30, 1917.

Professor G. G. Wilson in the Lectures referred to, dealing with "Cables as affected by Law and Policy," says:—

"The laws under which cables are operated help in determining their status in time of war. If France and Germany do as they propose in establishing cable service with their dependencies with the distinct purpose of securing more fully their military defence, it will be very difficult to convince Great Britain or any other Power that in the time of war so effective a means of defence are entitled to special exemption. Similarly, cables subsidized by the policy of a given state cannot expect to be free from a taint of participation in public service if the enemy wishes to maintain such a charge. . . . It must be observed, therefore, that the attitude of belligerents towards cables in the time of war will probably be influenced by the relations of the cable to the governments of the territories which they touch. It would be as absurd to exempt a subsidized cable from the consequences of hostilities as it would to exempt an auxiliary cruiser from such consequences. Probably the cable would be of greater service. There are those who claim that the state controlling the 'cables and the coal,' controls the world." [1]

[1] pp. 28–30.

Rear-Admiral C. H. Stockton, writing on the same subject, and dealing with the use to which cables would be put by belligerents, and the consequences, said :—

"It is generally recognized, certainly by the United States, that under certain circumstances and conditions, materials for the construction of telegraphs are contraband of war. Submarine cables, if found ashore in belligerent territory, or afloat bound for a belligerent destination, as an enemy's port of fleet, would certainly be liable to seizure as material for the construction of telegraphic communication, and hence contraband of war. If it then can be considered contraband of war on its way to a hostile destination on the high seas, as material or a component part of a working telegraph, how much more does such a cable become contraband of war when it is in working order, actually conveying aid, information, and possibly money to a belligerent or belligerent country in time of war." [1]

That a cable between a belligerent and a neutral is almost certain to be used for the purposes of the war, even with a strict censorship established by the neutral state, renders it probable that the other belligerent will take no risks. *The Times* correspondent in Washington, in a message dated December 17, 1920, reports that there is a strong feeling in the United States that political considerations should have led the Allies to refrain from interfering with the German cables during the war, and that an international convention should be entered into exempting cables from war-time interference, the chief reason advanced being that cables should be regarded as international utility agencies, because their linking up with land telegraphs gives them an infinite radius of action. This was undoubtedly one of the chief causes why the Germans desired to have their own system, and it must have been a potent reason with their enemies for cutting the cables and breaking the link.

The cutting of a cable between two neutral countries must require a strong justification, such as its forming part of a larger system, one terminus of which is in a belligerent country, and when the whole is enemy owned, and there is not an efficient censorship, the risk of its being used for unneutral service is so great that a belligerent is not likely to allow it to exist; but he will cut it at his peril. There are the elements of contraband and unneutral service in a case where the cable is being used for hostile purposes, and in Professor G. G. Wilson's opinion "they would render any other agency liable to seizure and probable confiscation on general principles." [2]

[1] *Proceedings of U.S. Nav. Inst.*, Vol. XXIV. p. 453. [2] *Op. cit.*, p. 84.

Two theories have been advanced as to the nature of the submarine cable, so as to provide analogies from other branches of law. One is that cables must be assimilated in their treatment to ships, and since it is not lawful to sink a neutral mail steamer because circumstances prevent a verification of her contents, therefore it is not lawful to cut a cable because it cannot be ascertained what messages are being sent by it. According to another view, cables are in the nature of bridges connecting two territories, they are therefore liable to be damaged or destroyed in circumstances analogous to those permitting the exercise of the rights of war on land.[1] But there appears to be no need for "bridge" or "ship" theories. Cables are a means which a belligerent has of keeping open his communications with the world. The great object of naval warfare is to stop the circulation of enemy commerce and to cut his means of communication, whether for the carriage of troops, property or intelligence, and cables are of the utmost importance for the last purpose.

A point on which there is no authority is whether a cable which has been cut and raised may be the subject of proceedings in a Prize Court. On the principles which have been advanced by both Professor Wilson and Rear-Admiral Stockton, namely, the contraband nature of the material and the use of cables for unneutral service, one is led to the conclusion that there is a *prima facie* case for their condemnation in Prize, when enemy owned, or used for hostile purposes. Property captured at sea by naval forces is normally the subject of Prize, and condemnation is the appropriate penalty for unneutral service. The Treaty of Versailles confiscates the enemy cables only so far as they are State-owned, but compensation is awarded to the private owners. Possibly in some future war, unless meantime a comprehensive agreement is reached by the Powers, the question may be tested in a Prize Court.

IV

Cable-cutting is by no means always an easy procedure, as the United States found in their war with Spain; but, in the past, belligerents have resorted to it whenever they felt that it was essential to their belligerent operations. Chile cut the British-owned cable connecting her territory with Peru in the

[1] A. Latifi, *Effects of War on Property* (1909, London), p. 114.

war which ended in 1883, but made compensation to the cable company. The United States, in 1898, found that military necessities required the cutting of the cables uniting Cuba, Porto Rico and Manila with the outer world (though neutral—British—owned), and compensation was refused to the Eastern Extension Telegraph Company for damage suffered from lawful acts of war. The cutting of the Manila-Hongkong cable put out of action an instrument of especial meteorological value for commercial interests in the Orient.[1] In the case of neutral-owned cables there is need for an agreement as to the compensation to be awarded in case the cable is not cut, but operated by a belligerent occupying enemy territory.

The United States War College (and as stated above opinion in the United States generally) desires an international agreement on the whole subject of the treatment of cables in war time. The widely extended use of wireless telegraphy has by no means rendered submarine cables of secondary importance. Wireless stations have been and will be the objects of attack from the air; their destruction is possible and lawful. Both methods of communication are of the greatest importance in time of peace; but in time of war a cable is a thing *sui generis*. Belligerents formerly sent their secret messages and dispatches by ships which were liable to visit, search and capture; they now have cables for this purpose. Cables cannot be visited and searched, and therefore, as the late M. Renault said, "Belligerents must find in the new situation an equivalent for the protection which they have lost."[2] A cable dispatch may be of more importance to a belligerent than a cargo of contraband or a blockade-runner. Control of communication is vital in war, and whatever international agreement is arrived at on the subject of submarine cables is almost certain to contain the formula, "so far as military necessities allow," or some equivalent.

In the foregoing an attempt has been made to deal only with some aspects of the question; the subject of neutral censorship has not been discussed. Some only of the facts have been indicated which must come before any international conference which may be summoned to take the matter in hand; they are facts which cannot be ignored. It is doubtful how far the

[1] E. J. Benton, *International Law of the Spanish-American War* (1908, Baltimore), p. 212. For other examples of cable-cutting, see P. Fauchille, *Traité de Droit international public* (1921, Paris), Vol. II. § 1321.

[2] *Annuaire de l'Institut*, 1902, p. 314.

precedent created by the Treaty of Versailles will be followed; the circumstances were special. International law has suffered some severe shocks from the proved unworkability of international conventions under the strain of war. Great Britain and France announced in 1916 that they were compelled to abandon the application of the rules contained in the Declaration of London, because they " could not stand the strain of rapidly changing conditions and tendencies which could not have been foreseen." [1] Regulations providing for compensation to neutral cable companies for the user of their property in certain circumstances may be found to be possible, but any Convention must, in order to be effective, contain clauses " the execution of which is possible from a military point of view, even in exceptional circumstances." Respect for international law is not increased, rather is its authority weakened, by the making of treaties which are found to be impracticable when the time comes for their application.[2]

[1] *Parl. Papers*, Misc., No. 22 (1916).

[2] See the speech of Baron Marschall at the Hague Conference in 1907. A. Pearce Higgins, *The Hague Peace Conferences* (1909, Cambridge University Press), p. 342.

THE EFFECT OF WAR ON TREATIES

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There are few questions upon which people concerned with the practical application of the rules of international law find the text-books less helpful than that of the effect of war upon treaties in force between belligerents. Both the practice of States, as exemplified in the provisions of treaties of peace, and the pronouncements of statesmen appear to conflict with the principles laid down by the text-books. The generality of treaties of peace contain a provision reviving the treaties in force between the belligerents, a procedure which seems meaningless unless war had put an end to the treaties. The statesmen have been equally emphatic. Lord Bathurst, in a memorable controversy, laid it down in 1815 that " Great Britain knows of no exception to the rule that all treaties are put an end to by a subsequent war between the parties." [1] In 1845 Mr. Buchanan, Secretary of State of the United States, maintained that the general rule of international law is that war terminates all subsisting treaties between the belligerent Powers, and that perhaps the only exception was that of a treaty recognising certain sovereign rights as belonging to a nation, which had previously existed independently of any treaty engagements. In 1856 the French plenipotentiary at the Congress of Paris maintained the same view :—

" Monsieur le Comte Walewski dit que l'état de guerre ayant invalidé les traités et conventions qui existaient entre la Russie et les autres Puissances belligérantes, il y a lieu de convenir d'une stipulation transitoire qui fixe les rapports commerciaux de leurs sujets respectifs à dater de la conclusion de la paix." [2]

On the other hand, in the North Atlantic Coast Fisheries Arbitration the Tribunal laid it down that international law in its modern development recognises that a great number of treaty obligations are not annulled by war, but at most suspended by it. Text-book writers also with practical unanimity maintain that treaties are not all annulled by war.

Even admitting, however, that the old rule is gone, this is but the beginning of the difficulty, for no two writers seem agreed as to what is the correct rule, and the principles laid down by those who write with assurance scarcely commend themselves as workable rules which will meet the requirements of modern conditions. What help do we gain from an elaborate classification

[1] *British and Foreign State Papers*, Vol. XXXIV. p. 97.
[2] *Ibid.*, Vol. XLVI. p. 99.

of treaties such as that which appears on p. 365 of Lawrence's *Principles of International Law*, where the classification is itself so nebulous as to leave one in great doubt as to which category a treaty should be placed in, and where the result arrived at is not infrequently "effect doubtful" or some similar phrase?

A thorough exploration of the whole question upon a scientific basis is much needed. Principles might then be formulated which would meet with general acceptance among the writers and students of international law, and would thus pave the way for a set of rules which would be universally adopted.

The rules adopted by the Institute of International Law at Christiania in 1912 [1] constitute far the best attempt which has been made to grapple with the subject. Their weak point, if one may venture to criticise, is that they are inspired too much with the doctrine, so prevalent in many quarters before 1914, that war was only an affair between the armed forces of the belligerent States, and that its juridical effect upon the relations of the civil elements of the population should be kept in the background. If the theory is sound that "La guerre ne met pas tout en cause, mais au contraire n'apporte aux règles du droit international pacifique qu'une altération exceptionnelle et qui doit être limitée," it is natural that the rules on the subject of the effect of war on treaties should adopt as the governing principle that, in general, treaties are not abrogated by the war. Can the theory quoted above be accepted after the experience of the last war? It is impossible to divide wars into great wars and little wars, particularly at the moment when a war breaks out: the juridical effects of an outbreak of war must be the same in all cases, and in view of the utter destruction of the normal relations between States which war has now been shown to entail in fact, it is useless to cling to a principle which is unreal.

In earlier days writers seem to have treated the character of the war as the factor which would determine its effect upon the treaties in force between the belligerents. In more modern times it is the character of the treaty, or of the particular provision in a treaty, which is regarded as the important element in determining the effect which an outbreak of war will have upon it. I cannot help doubting whether it is the character and nature of the treaty stipulation which is really the decisive element, and I submit, for the consideration of those who can

[1] *Annuaire, op. cit.*, Vol. XXV. p. 611.

devote themselves to a study of the subject, that the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded.' I submit that just as the duration of contracts between private persons depends on the intention of the parties, so also the duration of treaties between States must depend on the intention of the parties, and that the treaties will survive the outbreak of war or will then disappear, according as the parties intended when they made the treaty that they should so survive or disappear.

If the above is the true test, the problem which must be faced by international lawyers is that of formulating a series of presumptions to meet the cases where the words used in the treaty itself do not show clearly what was the intention of the parties at the time when they made it. Where that intention was clearly expressed, it is obvious that it must prevail, not because of some principle of law as to the maintenance or abrogation of treaties, but because it was the precise purpose which the contracting parties had in mind when they entered into their agreement. If two States go to war between whom a treaty exists that in the event of war their respective nationals should have so many months to withdraw from each other's territories, the reason why that treaty remains in force after the outbreak of the war is not that there is a principle that in general all treaties between the belligerents remain in force, or that it is one of a class which constitutes an exception to the general principle that war abrogates all treaties between belligerents, but because the parties clearly expressed their intention that it should so remain in force. The cases that present difficulties are where the treaty provides no clear indication of the intentions of the parties, and where that intention must be presumed from the nature of the treaty or from the concomitant circumstances. To meet these cases a code of rules, well thought out from the practical as well as from the scientific point of view, is much wanted.

Multilateral treaties with neutral parties must clearly stand on a different footing from treaties between parties all of whom have been engaged in the war. The recent world conflict presented for the first time on a large scale the problem of multilateral treaties all the parties to which were belligerents. There seems in theory no reason why such treaties should not stand

on the same footing as bilateral treaties between the belligerents. On the other hand, where there are third parties who have been neutral in the war, the reciprocal rights and duties between each belligerent and the third party, and the difficulty of terminating such rights and duties between any two parties when they are to continue in force between other parties, render it probable that when the treaty was concluded the intention was that, as between belligerent parties, war should not put an end to the treaty, even though while actual hostilities continued it might be difficult, or even impossible, to give effect to it as between the belligerents.

The commonest class of cases of this kind is that of the general international conventions on such matters as postal or telegraphic correspondence, industrial property, sanitary matters, and so forth, but the principle would also cover multilateral conventions with a political object primarily affecting a neutral third party: *e. g.* the Convention of 1907 respecting the independence and integrity of Norway.[1] Judging by its terms, the intention of that Convention was that it should constitute a kind of self-denying ordinance on the part of the Great Powers for the purpose of ensuring the integrity of a State which remained neutral during the late war. The language employed affords no reason for presuming that the parties intended, when they concluded that Convention, that if war broke out between them they should be freed from their obligations *inter se* any more than from their obligations towards the State which remained neutral.

On the whole it seems safe to state that the outbreak of war does not invalidate, as between the belligerents, a multilateral treaty to which States remaining neutral are parties, even though while hostilities last the treaty may be difficult or incapable of execution; but that a multilateral treaty all the parties to which are belligerents will stand on the same footing and be judged by the same tests as bilateral treaties between the belligerents.

There is nothing, of course, to prevent the inclusion in the Treaty of Peace of a provision by which one party renounces or relinquishes all rights and benefits derived from any such treaty. There are instances of such renunciation in the Treaty of Versailles. The rule as formulated above deals only with what may be presumed to have been the intention of the parties

[1] Treaty Series, 1908, No. 4.

as to the effect of war, if it should break out between them, and which will determine its survival after the war if no provision relating to it is inserted in the Treaty of Peace.

Turning now to treaties all the parties to which are belligerents, it may be convenient to deal first with treaties concluded with a political object. In all such treaties the *status quo* at the time of their conclusion is an essential element: the *status quo* may be vitally affected by a war. No one can tell at the moment of the outbreak of the war what the position will be when it is concluded, and it is, therefore, safe to presume that when the parties concluded a treaty with a political object they did not intend that it should survive the outbreak of war between them unless they inserted a provision indicating such an intention. In general, therefore, treaties between the belligerents concluded with a political object are abrogated by war.

Difficulties may, of course, arise in determining whether or not a particular treaty was concluded with a political object. A precise abstract definition cannot be laid down. It will generally be far easier to say whether or not a particular treaty was political in its nature than to formulate a theory as to what constitutes a political treaty.

There is one small class of treaties which in a sense are political, but which must certainly be excluded from the class of treaties dealt with above. It consists of treaties laying down rules of conduct which the States concerned agree to abide by. An instance may be found in the Treaty of Washington of 1871, in which Article 6 laid down the rules which Great Britain and the United States of America acknowledged as binding on them in respect of the obligations of neutrality. Rules of conduct of this kind do not appear to be dependent in any way on the *status quo*, nor is there anything in them to suggest that it was the intention of the parties that the rules should be otherwise than permanent until varied by mutual agreement. Probably the whole class which Professor Oppenheim designates as "law-making treaties" might be comprised under this head, but as these are usually multilateral, other reasons exist for maintaining that the parties may be presumed to have intended that they should not be affected by war.

Another small class which must be excluded is that of treaties providing for the periodical payment of sums of money by one State to another. This appears to be the deduction from the

controversy between Spain and the United States of America after the Spanish-American War as to the annuities due under the Treaty of 1834. The similar question between Russia and Great Britain in 1856 as to the interest on the Russo-Dutch loan cannot be regarded as a precedent, as the Treaty of May 19, 1815, expressly stated that its operation was not to be affected by the outbreak of war between the parties. In Article 128 of the Treaty of Versailles, Germany was called upon to renounce all claims to any of the Boxer indemnities accruing subsequent to March 14, 1917, the date of China's entry into the war, an unnecessary provision if China's engagement to pay the annuities had not been intended to be unaffected by an outbreak of war.

Treaties regulating economic and commercial relations are not entered into by States without full regard being paid to the relative status and importance of the other country concerned, and to its commerce, wealth and industries. Who can tell what effect a war will have on the commerce, wealth and industries of another State? The whole class of commercial treaties may, therefore, safely be considered as treaties which the parties intended not to survive the outbreak of war between them unless they used language which made a contrary intention apparent.

Writers on international law are almost unanimous in regarding war as abrogating treaties of commerce. Theory and practice coincide in this case, for the future economic and commercial relations between the two countries are almost invariably provided for in the treaty of peace by which a war is concluded. It is noteworthy, however, that in 1858 the Court of Appeal at Aix is stated to have held that a treaty of commerce was only suspended by war.[1]

Treaties affecting the private rights of the nationals of the other party afford a most interesting study. Both justice and common sense seem to call for the fullest respect being paid to rights which private persons enjoy under treaty in the territory of the other party, but the principle need not be extended beyond the respect of rights already acquired; it need not involve an obligation upon a State to allow the acquisition of new rights.

So far as concerns rights to acquire and hold property, treaty provisions of this nature have been the subject of decisions both in the English and in the American Courts. The upshot appears to be that, so far as concerns property already acquired, the right

[1] Coleman Phillipson, *op. cit.*, p. 254.

to hold it conferred by the treaty is not affected by the outbreak of war with the State of which the owner is a national; but whether the nationals of that State continue after the outbreak of war to be entitled to acquire and hold property, has never been decided in the Courts. The judgment of Washington J. in *S.P.G.* v. *Newhaven* [1] suggests that the Supreme Court of the United States would have held that individuals entitled to the benefit of the treaty were able to obtain new property rights after the war had supervened, otherwise the passage in his judgment as to the permanence of treaties seems unnecessary, as he had already made it clear that acquired rights were not affected by the war. The judgment of Leach M. R. in *Sutton* v. *Sutton* [2] is rather the other way. Mr. Bayard, however, when Secretary of State in the United States, laid it down in 1885 that the operation of this stipulation is limited to lands held in the United States and Great Britain respectively in 1794, and that as to the subsequent title to lands so held at that time, the effect of the treaty may be deemed permanent. If this construction of the treaty is right, it limits its operation more narrowly than the decision of the Supreme Court warrants.[3]

Stipulations in a treaty conferring an amnesty on particular classes of individuals must also be intended to be permanent in their effect. The individual was intended to be protected against the consequences of past conduct, and it would be unreasonable that a subsequent war should affect the consequences of past conduct.

The question of the continued enjoyment of a special status in a foreign country where that status is dependent on a treaty is much more difficult. The problem has arisen in countries where the régime of the capitulations exists, and war breaks out between the territorial State and the capitulatory State. Article 10 of the Treaty of Constantinople of 1879 between Russia and Turkey provided that:—

> "all treaties . . . relating to the position of Russian subjects in Turkey which had been suppressed in consequence of the state of war shall be put in force again."

The language employed certainly suggests that war had put an end to the treaty on which the extra-territorial rights depended. In 1897, when war broke out between Turkey and Greece, Turkey

[1] 8 Wheaton, 494. [2] 1 Russell and Mylne, 663.
[3] Moore, *op. cit.*, Vol. V. p. 374.

claimed that Greeks could no longer benefit by the extra-territorial régime, but the Great Powers intervened and forced Turkey to recede from her position. It was claimed, however, that the special treaty rights of Greeks in the Ottoman Empire depended on arrangements to which the Great Powers were parties, and that they were for this reason unaffected by the war. The Turkish claim that war terminated the capitulatory right of a State which made war upon her was repeated in 1911 at the outbreak of the war with Italy.

No similar claim was made by Turkey in respect of enemy subjects in 1914, but a special reason for the absence of any such claim is to be found in the Turkish attempt, a few weeks before she entered the war, to abolish the capitulations by an unilateral Act.

The position as to the continuance of extra-territorial rights in favour of enemy subjects is thus somewhat confused. It may also be difficult to provide for their exercise, as war entails the withdrawal of the consular officers maintained by the enemy Power. The special rights of protection fulfilled by the consular staff must therefore cease to be carried out unless they are undertaken by the representatives of the Power to whom the care of enemy interests is confided. Furthermore, the right of a State to insist on the withdrawal of enemy subjects cannot be questioned, and expulsion would free the territorial State from the presence of these claimants to capitulatory rights. Nevertheless, it seems that if they are allowed to remain in the country, the more modern practice is to insist that the jurisdictional privileges should be respected.

The view that such jurisdictional privileges should remain in force is not unreasonable. It is not only the individuals who are exempt from the local jurisdiction, but also their property other than land, and even if the individuals can be expelled, it is not likely that they can take all their property with them. The original basis of the immunity from the local courts was that the local legal system was so different from that to which the foreigner was accustomed, that it would not have been just that it should apply to the foreigner. War would not alter this fact, and the presumption that the intention was that the foreigners who remained in the country, and their property, continued to enjoy the immunity is, therefore, not difficult to defend.[1]

[1] A somewhat analogous personal privilege originating in a treaty was held by

Most writers regard treaties of cession of territory, or other treaties effecting permanent territorial dispositions or intended to effect permanent settlements, as treaties which are themselves permanent, and, therefore, unaffected by war. It is the class of treaties which Westlake describes as "dispositive," and which other writers designate as "transitory," though they describe them as permanent. Surely the principle maintained by these writers is unnecessary and unscientific. It is the acquired rights which flow from the treaties which are permanent, not the treaties themselves. The treaties cease to be in force, *i. e.* they are no longer operative, from the moment when the arrangements which they contemplate are carried into effect. They are spent; they are, so to speak, merely the title-deeds to the territory which the parties to the treaty agreed to transfer, or to the juridical act which the parties intended to achieve. The title to the territory or the act does not depend on the treaty remaining in force.[1] If the title to territory depended on the continuance in force of the treaty by which the cession was effected, the title to the territory would not be good as against third Powers unless they became parties to the treaty. It is, however, generally admitted that treaties effecting a transfer of territory create rights in favour of the transferee State, corresponding to property rights or rights *in rem* of individuals, which are good against all strangers if the transferee had a good title.

May it not safely be laid down that treaties concluded for the purpose of carrying into effect, once and for all, an arrangement intended to be permanent cease to be operative from the moment when they are executed? If so, such treaties are unaffected by a subsequent war between the parties, not because they continue to be in force despite the war, but because they had already ceased to be in force before the war broke out. The intention of the parties had been fully executed. If such a treaty contains other provisions which are still executory, the effect which the outbreak of war will have upon those provisions depends on the

the Supreme Court of the United States to be one which could be taken away by national legislation after the treaty had ceased to be in force.—*Chinese Exclusion Cases*, 130 U.S., 581.

[1] Compare the decision in *Chirac* v. *Chirac* (1817), 2 Wheaton, 259, where it was held by the Supreme Court of the United States that Art. 7 of the Treaty of 1800 between France and the United States, which provided that if the laws of either country prevented aliens from holding real estate, citizens of the other party might sell their land to local citizens, conferred a right upon the individual which endured for life and did not expire with the expiration of the treaty.

nature of such provisions, and on the principles applicable to treaty stipulations of that character.

It is impossible within the limits of an article to deal with every phase of a subject so large as that of the effect of war on treaties. My object is only to submit, for the study and consideration of those who are able to deal with the problems of international law from the scientific point of view, that the element on which must depend an answer to the question whether or not a particular treaty is or is not abrogated by the outbreak of war between the parties, is to be found in the intention of the parties at the time when they concluded the treaty, rather than in the nature of the treaty provision itself. The classes of treaties I have dealt with above are only intended to illustrate some of the rules which would follow from the adoption of this principle.

MANDATED TERRITORIES: PALESTINE AND MESOPOTAMIA (IRAQ)

By NORMAN BENTWICH,
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THE term "mandated" territories, which has somehow become accepted, is not very happily chosen to describe the status of the countries which are to be detached from the Ottoman Empire. The essential feature of the new status which will be acquired by Palestine, Syria and Mesopotamia in virtue of the provisions of the Treaty of Sèvres between the Allied Powers and Turkey is that the League of Nations becomes the general guardian of three infant nations, and a new relation is set up in international law, like that in private law of tutor to ward. The mandate is merely the machinery by which the League of Nations carries out its functions. The League delegates the care of the minor to a Power who is termed the Mandatory; and lays down the terms of his charge in a Mandate; and the Mandatory is then responsible to the League as to a Court for the carrying out of the trust.

Article 22 of the Covenant of the League of Nations thus states the fundamental principles of this new status of minor nations:—

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

"Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations

can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."

It might have been expected that the appointment of the Mandatory as well as the determination of the terms of the Mandate would have been left to the League of Nations, to which the Mandatory is responsible. This, however, has not been done, nor even have all the parties to the Treaty of Sèvres been given a voice in the selection of the Mandatory. The Treaty provides that the Principal Allied Powers shall select the Mandatories for Syria, Mesopotamia and Palestine; and at the Conference of San Remo, held in April 1920, the Mandates were actually allotted to England and France. Effect has been given to their selection, although as yet the terms of the Mandates have not been finally settled. It is the Principal Allied Powers again, and not the Council of the League of Nations, to whom it falls to formulate the terms of the Mandate; and the Council of the League has only the function of examining the draft and ascertaining that it is in keeping with the provisions of the Covenant of the League. The cynics may, and do, say that England and France have simply extended their Empires by a new device of statecraft. But the spirit which caused the introduction of the idea of the Mandate marks a radical change from the spirit which prompted the partition of the backward parts of the world in the last century. The new principle which is embodied in the Covenant of the League of Nations, and is concretely expressed in the draft Mandates that have been prepared for Syria, Mesopotamia and Palestine, is that *noblesse oblige* in national as well as in private affairs.

The imperial policy of the nineteenth century devised the idea of the protecting State, which covered a multitude of powers; and the idealistic policy of the peace-making period, *i. e.* the policy which inspired the Covenant of the League of Nations, has devised the notion of the guardian State which discloses a multitude of responsibilities. The difference between the protector and the guardian is that the former obtains rights over the population and against other Powers; the latter assumes obligations towards the population and towards the Society of Nations.

There has been much delay in the publication of the draft Mandates, and they have not yet been laid before the Council of the League of Nations, which has to pronounce finally upon them, though they have at last, after a furtive appearance in the Press, been officially published. They are then still liable to modification, either by the Council, or, possibly, by the Parliaments of the Mandatory Powers. Whatever change of detail, however, may yet be made, the main principles of the Mandates are defined in the provisions of the Treaty of Sèvres; and on the assumption that the signature of that Treaty involves its acceptance by Great Britain and by the other Allied Powers, at least in so far as Palestine and Mesopotamia are concerned, those principles are already established, and are being carried out by the British Administration.[1] A civil government under a British High Commissioner, the Rt. Hon. Sir Herbert Samuel, has since July 1920 replaced in Palestine the Military Administration of what was somewhat frigidly called Occupied Enemy Territory. In Mesopotamia the military occupation was transformed into a civil government under a British Civil Commissioner very shortly after the occupation of Bagdad in 1917; and since the autumn of 1920 that civil government has received a more permanent character under a British High Commissioner—Sir Percy Cox. In both countries it is the enlightened policy of a mandate, still imperfect in its legal foundation, which guides the Administrator, and is allowed to prevail over the strait confines of the powers of a temporary military occupant to further the development of the occupied territory.[1]

The purposes and the nature of the Mandate for Palestine and Mesopotamia are markedly different. What is common to them is that the Mandatory Power is not to take any advantage to itself in exercising the Mandate; that it is not to raise any military force in the territory except for the defence of the country; that it is not to allow any discrimination to be made in commercial legislation against the nationals of any of the States which are members of the League of Nations; that it is to submit an annual report to the Council of the League of Nations as to the measures taken during the year to carry out its trust; and that if any

[1] This article was written in May, and the remark is still true in August, when the MS. was received for revision. The position in Mesopotamia—or Iraq, as it is to be called—has, however, changed fundamentally by the election of the Emir Feisal as King. The British High Commissioner becomes the adviser of a sovereign instead of the ruler of the country; and Iraq becomes at once a separate State.

dispute arises between the members of the League of Nations in regard to the interpretation or application of the terms of the Mandate, it shall be submitted in default of agreement to the permanent Court of International Justice provided for by the Covenant of the League of Nations.

The differences in the Mandate arise from the peculiar nature of the trust for Palestine. The Mandatory is to administer that country not simply on behalf of the population which is there, but with a view to help the people which desires to come there. The Mandatory is responsible for putting into effect the declaration originally made in November 1917 by the British Government, and subsequently adopted by the other Allied Powers, in favour of the establishment in Palestine of a national home for the Jewish people. At the same time he is responsible that nothing should be done which might prejudice the civil and religious rights of the existing non-Jewish communities in Palestine.

There is no parallel in history to a State undertaking a task of this kind, not on behalf of its own subjects, but as a trustee for the conscience of the civilised world. The nearest approach to such a trust is the conduct of Great Britain and other Powers that were parties to the Treaty of Vienna in 1815 and the Treaty of London of 1841, in taking common measures to abolish the slave traffic. But the task of the Mandatory of Palestine is very much more difficult and more responsible. It undertakes the continual and gradual realisation of an ideal. It must initiate a system of government and administration which, while securing justice and fair treatment for the existing population of Palestine, will enable a new national life to be established there.

It was clearly necessary in order to achieve this end that the Mandatory should be able to exercise the powers inherent in the government of a sovereign State, and should not have its functions limited to the rendering of administrative advice and assistance. At the same time it is directed to encourage the widest measure of self-government for localities, consistent with the prevailing conditions. The Mandatory is to recognise as a public body for the purpose of advising and co-operating with the Government of Palestine an appropriate Jewish agency; and the Zionist Organisation is to be recognised as such agency so long as its organisation and constitution appear to be appropriate. In co-operation with the Zionist body the Palestine

Government is to facilitate Jewish immigration under suitable conditions and to encourage the Jews to settle on vacant lands. Again, the Government is to enact a nationality law designed so as to facilitate the acquisition of Palestine citizenship by Jews who take up their permanent residence in Palestine.

Apart from the trust to further the re-establishment of Jewish nationality, the Mandatory is to have regard in the Government of Palestine to the more progressive ideas of modern social policy. It is given full powers to provide for the public ownership or control of any of the natural resources of the country or the public works and services established or to be established therein; and it is to introduce a land system which shall have regard to the desirability of promoting the closer settlement and more intensive cultivation of the land. All that capitalistic exploitation which marked the development of Africa and the Far East under the protection of European States in the nineteenth century is directly negatived in the terms of the Mandate for Palestine. It is provided, moreover, that where the Administration does not directly undertake itself to develop the natural resources or conduct public works and services, it may arrange that these things be done by the recognised Jewish agency, but on condition that the benefits to be distributed, whether directly or indirectly, shall be strictly limited, and any further profits realised shall be used for the benefit of the country in a way approved by the Government.

The peculiar triple character of the Government is marked by an article in the Mandate which declares that English, Arabic, and Hebrew shall be the official languages in Palestine, and that any inscription on the stamps or money of Palestine must appear in Hebrew as well as in Arabic. It is marked again by an article which declares that the Government shall recognise the holidays of the respective communities as legal days of rest for their members.

Some of these measures have already been introduced in anticipation of the definite granting of the Mandate. An Immigration Law has been in operation for nearly a year by which, subject to reasonable safeguards, immigrants can come into the country. A Land Commission has been appointed to consider what steps may be taken for ensuring the closer settlement of the country, and certain legislative measures have already been introduced to that end. The municipalities which

existed under the Turkish régime have been encouraged. Municipal taxation is being reformed, and facilities have been provided by which the larger villages, as well as any urban areas with a distinctive character, may obtain corporate personality and elect a local council. The three languages have been officially adopted, and in certain areas which have a considerable Jewish population Hebrew as well as Arabic is regularly used as the language of pleading in the Courts and in correspondence with the Government. The temporary postage stamps in use in Palestine, which are a survival of the military administration, mark the new status of the country by their surcharge of "Palestine" written in the three official languages.

A large part, however, of the principles enunciated in the Mandate await the beginning of realisation when the Council of the League of Nations shall at last have given its decision. And it is only when that step has been taken that the sovereign powers of the Mandatory can become effective, and the '*damnosa hereditas*' from the Ottoman Empire, which has to a large extent clogged the reforming activity of the provisional administration, can be finally discarded. When the day of release comes, the whole of the capitulatory régime is to be definitely abrogated, and the Mandatory on its part will be responsible for seeing that the judicial system shall safeguard the interests of foreigners as well as the special laws of the religious communities, and the jurisdiction with regard to the personal status of their members. The Mandatory, in the same way as a protecting Power, will be entrusted with the control of the foreign relations of the Mandated State, and will have the right to afford diplomatic and consular protection to citizens of Palestine outside its territorial limits. Palestine will have a separate Government and form a separate national unity with its particular citizenship. It will not be, however, so long as it is subject to the Mandatory's control, a separate sovereign State.

The Mandatory of Palestine undertakes responsibility not only to the people of the country and to the Jewish people all over the world, but in a special way to the League of Nations, in regard to the religious interests of the civilised world in the cradle of religion. Humanity has more than once been rent with wars on account of the holy places and religious buildings and sites in Palestine; and the Mandatory Power itself is to be responsible solely to the League in all matters connected with

these buildings and sites, while being entitled to make an arrangement with the Administration of the country for the purpose of ensuring the requirements of public order and securing free access to the holy places. It is to appoint a special commission, as soon as the Mandate is granted, to study and regulate the claims between the different religious communities; and it will be the duty of the Commission to ensure that certain holy places and religious buildings and sites regarded with special veneration by the adherents of one particular faith are entrusted for control to a suitable body representing the adherents of the religion concerned. In the nineteenth century it was one of the principles of European statecraft that places and territories of concern to the whole civilised world should be neutralised and placed under some international guarantee. The experience of the war has impaired the faith in the efficacy of such neutralisation and of the international bond. The idea which has taken its place is that of the trust vested in one single Power on behalf of the Society of Nations and controlled by the Assembly representative of that Society. It is in the Government of Palestine particularly that the principle of the trust for civilisation vested in the guardian with a conscience receives its full development.

The last clause of the Mandate provides for the maintenance and protection of these religious rights even after the termination of the Mandate of the present Mandatory. The Council of the League of Nations is then to make such arrangements as it may deem necessary for securing that the Government of Palestine will safeguard in perpetuity, under the guarantee of the League, the rights of religious communities. One other interest for which provision is made when the Mandate is terminated is the honouring of the financial obligations legitimately incurred by the Government of Palestine during the period of the Mandate. Thus, if any loan should be raised by the Mandatory Power and secured on the revenues of Palestine, it will be the business of the League to see that that obligation is respected by the Government of the country when it should reach its majority.

Another common interest of civilisation in Palestine is protected by an article of the Mandate which requires the Mandatory to enact a law of antiquities to replace a former Ottoman law. The new legislation shall ensure equality of treatment in the matter of archæological research to the nationals of all States

which are members of the League of Nations. Here again the civil administration which has been governing the country since July 1920 has already taken action; it has brought into force an Ordinance which embodies the most progressive ideas of our time regarding Government control of archæological research in the interest of the country and of science.

A few other features of the Mandate call for passing mention. Complete freedom of conscience and the free exercise of all forms of worship are ensured to all, and no discrimination may be made between the inhabitants of Palestine on the ground of religion or language; nor may any person be excluded from Palestine on the sole ground of his religious belief. The right of each community to maintain its own schools for the education of its members in its own language may not be impaired, and no measures may be taken, other than those required for the maintenance of good order and good government, to obstruct or interfere with any missionary society on the ground of its religion or nationality. That is a broad and generous principle which sweeps away any exclusion of persons who are subjects of former enemy States.

Compared with the task of maintaining the nice balance of equities between the different communities and interests, and securing at once the protection of the present population and the restoration of the world's oldest nationality to Palestine, the problems and functions of the Mandatory in Mesopotamia appear to be simplicity itself. In the draft Mesopotamian Mandate the ideas expressed in Article 22 of the Covenant of the League find their direct amplification. The Mandatory is within three years to frame an organic law in consultation with Arab opinion which shall safeguard the progressive development of Mesopotamia as an independent State. It has indeed already ceased to exercise sovereign powers and facilitated the establishment of a national government. Its principal duty is to assist the Arab peoples to become an independent nation and to render them advice and assistance to that end. It falls indeed to the Mandatory to secure freedom of language and worship for all communities in the country, and so far as possible to facilitate the using of local and tribal or religious law. But its controlling activities are designed to be altogether temporary. For in Mesopotamia there is only one ward to look after, and the Mandatory's duty is to educate that

ward to be able to act entirely for itself, and at once to let it walk on its own legs.

Nothing is expressed in either Mandate or in the Covenant of the League of Nations about the right of the Mandated territories to be represented separately in the League. So long as the infant status remains, it may be that the guardian or Mandatory Power will represent its ward in the International Parliament. A permanent Commission has, however, already been established by the League of Nations for dealing with the Mandated territories; and the Commission is to receive annually the report of the Mandatory Power upon the way in which it has carried out its trust. It will be for the Commission to draw the attention of the Council of the League to any point on which the Mandatory may appear to have departed from the true principles of the Mandate; and the Council will, in turn, bring the matter to the attention of the Mandatory Power. The sanction for the observance of the high principles of the Mandates is not physically strong, for it cannot be expected that the League, even if it were equipped with armed force, would direct it against the Mandatory on account of any failure to observe the conditions of its trust. The sanction is, and must be, primarily moral. It is the very basis of the new world order which is realised by the League of Nations, that the attention of the world is focussed directly and systematically on the tutelary government of the younger and less advanced nations; and the moral sense of the guardian nation must respond to any admonition of the Society of Nations. The difference is not that international law will be enforced by a new physical sanction, but that it will be based upon a firmer and more systematic moral foundation; and among the leading doctrines of international law in its extended sphere is the right of nationalities, great and small, in the East as in the West, to live their national life, and the duty of the greater States to train them to that end.

JUDICIAL RECOGNITION OF STATES AND GOVERNMENTS, AND THE IMMUNITY OF PUBLIC SHIPS

By ARNOLD D. McNAIR,
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IT is proposed to consider under this title a number of problems of recognition and of the status of Public Ships which the events of the past few years and, in particular, the revolutions and the ensuing dismemberment of Russia have forced upon the attention of the English Courts.

Apart from the recognition of the belligerency of insurgents (with which we are not at present concerned, though it may well be that several of the fragments of the late Russian Empire have passed through that stage on their way to statehood), recognition in international law is of two main types :—

(i) Recognition of a new State;
(ii) Recognition of a change in the headship of a State or in the form of its Government.[1]

It is proposed, with the aid of the Russian cases and others, to consider :—

(*a*) the effect of these two types of recognition as applied by English Courts of Law, including incidentally the methods adopted by these Courts in ascertaining whether recognition has been granted by His Majesty's Government or not, and

(*b*) the scope of State Immunity as applied to Ships.

The modes by which recognition of either of these types may take place are numerous, and the past three years have afforded a number of illustrations. We are here concerned rather with the mode in which the British Government intimates to its own Courts and subjects its recognition of a new foreign State or Government. It by no means follows that the new foreign State or Government can always base upon such an intimation a claim that in extra-judicial matters as well it has,

[1] Oppenheim, *International Law* (3rd ed., 1920), Vol. I. Peace, § 75.

as a matter of international law, been recognised. If it were a party to the proceedings for the purpose of which that intimation was given, it could probably claim that it had been recognised for diplomatic and other international purposes. If it were not a party, it is at least arguable that the judicial recognition is *res inter alios acta*, and that it cannot, as against the Government responsible for the recognition, found a claim to membership of the Family of Nations upon private instructions or advice given by that Government to its judicial officers. It is suggested, however, that the international effect of judicial recognition might well receive the attention of international lawyers as a mode of the recognition of a new State or a new Government. At present we are more concerned with the domestic aspect in proceedings in English Courts.

I. *Recognition of New States.*

Must recognition be unqualified and irrevocable? Oppenheim [1] asserts that "the nature of the thing makes recognition, if once given, incapable of withdrawal," and that the effect of recognition offered upon condition that the new State acts in a certain manner is that, if that conditional recognition is accepted, the new State comes under an "internationally legal duty . . . of complying with the condition; failing which a right of intervention is given to the other party for the purpose of making the recognised State comply with the imposed condition"; and that "the meaning . . . is not that recognition can be withdrawn in case the condition is not complied with."

But, at any rate for judicial purposes, our Courts do not insist upon absolute and unqualified recognition. In the *Gagara* [2] the Court was informed by the Attorney-General, appearing on behalf of the Foreign Office, that His Majesty's Government:—

"has for the time being provisionally, and with all necessary reservations as to the future, recognised the Esthonian National Council as a *de facto* independent body, and accordingly has received a certain gentleman as the informal diplomatic representative of that Provisional Government. The state of affairs is of necessity provisional and transitory."

Thereupon the Court of Appeal, affirming the decision of Hill J., considered that the Courts of this country were bound to decline

[1] *Op. cit.*, § 73. [2] [1919], P. 95.

jurisdiction in a cause affecting a ship which was in the possession and service of the Esthonian National Council, and which was stated by that Government to be in use by them for public purposes.

On the other hand, in the cases of the *Annette* and the *Dora*,[1] where Hill J. was asked to entertain a possession suit against two vessels alleged to be in the possession or service of the Provisional Government of Northern Russia, he consulted the Foreign Office through the Admiralty Marshal, and that officer was informed by letter that that Government was "merely provisional in nature, and has not been formally recognised either by His Majesty's Government or by the Allied Powers as the Government of a sovereign independent State." The letter added that the British Government was co-operating with the Provisional Government against the forces of the Russian Soviet Government, and that there was a British Commissioner at Archangel and a representative of the Provisional Government in London. On these facts Hill J. was invited to hold that His Majesty's Government had informally recognised the Provisional Government as a sovereign independent State, but he declined to do so, and accepted jurisdiction of the suit. It was clear that the statement of the Foreign Office did not go so far as the Attorney-General's statement in the *Gagara*, but in both cases the statements were conclusively binding upon the learned judge.

11. *Recognition of a Change in the Headship of a State or in the Form of its Government.*

The usual occasion upon which the Courts of this country are called upon to consider questions of international status arise in connection with claims by some foreign person or group of persons to the personal and proprietary immunities accorded by our law to a sovereign ruler or State. But the status of the present Russian Soviet Government has been forced upon the consideration of our Courts in other and less direct ways, though the question may at times arise in the more normal and direct method.

Recognition of a new Government which has climbed into power by means of a series of revolutions is not a thing to be

[1] [1919], P. 105.

done in a hurry; "it may . . . be difficult to decide whether a certain individual is, or is not, the head of a State, for after a revolution some time always elapses before matters are settled." [1] Accordingly, it would appear to the spectator that the British Government, having decided at some time in the year 1920 that the Soviet Government in Russia had "come to stay," at any rate for a considerable period of time, and that on economic grounds it was important to reopen the markets of Russia to Western Europe, addressed itself to the problem how far commercial relations could be resumed without committing this country too deeply or giving offence to any of our Allies or any considerable section of the British electorate. M. Krassin arrived in London as the head of a Russian Commercial Delegation, with the knowledge, consent and permission of the British Government, and the status of this body can be gathered from the letters written on behalf of the Secretary of State for Foreign Affairs, in July, October and November, 1920, to M. Krassin's solicitors and to solicitors acting for certain litigants about to be mentioned. From these letters [2] it seems that the British Government admitted that M. Krassin was and had been received by them as the authorised representative of the Soviet Government for the purpose of carrying out certain negotiations; that as such he should to a limited extent be exempt from judicial processes; and that the Russian Commercial Delegation represented in this country a State Government of Russia; but "His Majesty's Government have never officially recognised the Soviet Government in any way." Now in August, 1920, this Delegation, on behalf of the Soviet Government, sold a certain quantity of ply-wood to a firm in England, James Sagor & Co. As soon as the ply-wood began to arrive in London and Hull, Messrs. Sagor, on noticing the trade-mark upon it, informed the English owners of the mark, and thereupon a company incorporated in Russia (whom we shall call the plaintiffs) appeared on the scene and said to Messrs. Sagor: "That is our ply-wood, marked with our trade name (or, more strictly, one we are permitted to use); please hand it over"; and they asked the Court for a declaration of their title, an injunction, and damages for conversion.

[1] Oppenheim, *op. cit.*, § 343. See also W. E. Hall, *International Law* (7th ed., 1917), § 97; J. Westlake, *International Law* (2nd ed., 1910), Vol. I. p. 58. As to the effect upon intermediate dealings of a counter-revolution and the restoration of the former Government, see *Republic of Peru* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D., 348.

[2] [1921] 1 K.B. at pp. 460 and 476–7.

This ply-wood had been expropriated without payment in Russia in the year 1919 by Commissaries acting on behalf of the Russian Soviet Government. If that expropriation was to be regarded as the official act of a sovereign State, then it must belong to the defendants, Messrs. Sagor, the purchasers from the Soviet Government. If, on the other hand, it was to be regarded as mere robbery, then the property in the ply-wood remained in the plaintiffs. The answer was clearly vital to the trading operations of M. Krassin and his Delegation.[1] Messrs. Sagor contended, in reliance upon the letters from the British Foreign Office above mentioned and upon the presence of the Russian Delegation in London, that the Soviet Government was at any rate the *de facto* Government of Russia; that this expropriation took place in pursuance of a confiscatory decree emanating from a sovereign Power; and that thereby the property in the ply-wood passed from the plaintiffs to the Russian Government and thence to themselves, the defendants. Roche J., having inquired of the Foreign Office through the Senior Master of the King's Bench Division whether it was desired by that Department to add anything to the correspondence above referred to, and having received a reply in the negative, held on December 21, 1920, that "His Majesty's Government has not recognised the Soviet Government as the Government of a Russian Federative Republic or of any Sovereign State or Power. I am therefore," he added, "unable to recognise it, or to hold that it has sovereignty, or is able by decree to deprive the plaintiffs of their property." Judgment accordingly for the plaintiffs. And the Court of Appeal on May 12, 1921, stated that on the evidence before Roche J. his decision was quite right.

The propositions of law which Roche J. extracts after an examination of the English and American cases are as follows:—

(i) "If a foreign Government is recognised by the Government of this country, the subjects and Courts of this country may, and must, recognise the sovereignty of that foreign Government and the validity of its acts.

[1] That this was so is obvious from Tchitcherin's Note to Lord Curzon (the British Foreign Minister), summarised in *The Times* newspaper of February 9, 1921, of which the following is an extract:—

"The recent judgment in the Sagor case makes it, moreover, clear to the Russian Government that the confirmation of this decision by a higher Court (*sic*) of similar judgments with reference to Russian gold or goods would render the trade agreement unworkable, and would be, therefore, a lawful ground for its immediate automatic annulment, and that this point must be duly stipulated in the Treaty."

(ii) "If a foreign Government or its sovereignty is not recognised by the Government of this country, a judicial Court of this country either cannot, or at least need not, or ought not to, take notice of, or recognise such foreign Government or its sovereignty." [1]

But meanwhile the British Government had advanced along the path of recognition, having on March 16, 1921, concluded a Trade Agreement with the Soviet Government through the agency of M. Krassin, and Messrs. Sagor had appealed. They obtained two further letters, dated April 20 and 22, 1921, from the Foreign Office to themselves which convinced the Court of Appeal: (*a*) that His Majesty's Government then recognised the Soviet Government as the *de facto* Government of Russia, and (*b*) that the Soviet authorities had assumed the sovereign power in Russia when they dispersed the Constituent Assembly in December, 1917.

What effect was to be given to this? Was it to be retrospective? Bankes L. J. stated its effect to be that "the acts of the (Soviet) Government must be treated by the Courts of this country with all the respect due to the act of a duly recognised foreign Sovereign State," that the recognition was retrospective to December, 1917, and "that the decree of confiscation of June, 1918, the seizure of the plaintiffs' goods in January, 1919, and the subsequent sale of them to the defendants in August, 1920, were all acts of the Soviet Government as the *de facto* Government of Russia, and must be accepted by the Courts of this country as such." So Messrs. Sagor kept their ply-wood.[2]

[1] *Company for Mechanical Woodworking A. M. Luther* v. *James Sagor & Co.* [1921], 1 K.B. 456, 474.

[2] In two American cases arising out of the recent Mexican Revolutions a similar conclusion has been reached (*Oetjen* v. *Central Leather Co.* (1917), 246 U.S., 297; *Ricaud* v. *American Metal Co.* (1917), 246 U.S., 304, where the precedents and other authorities are cited in great numbers).

Note on the Soviet Gold.

The position of gold in the hands of the Russian Soviet Government or its transferees will probably have been judicially determined before this article appears in print, a test case having been started in the English Courts; but it is perhaps deserving of a few words.

(*a*) It is difficult to see why the *ratio decidendi* of the *Sagor* case should not apply so as to protect gold in the same circumstances as the ply-wood, so long as the British Government continue to recognise the Soviet Government as the *de facto* Government of Russia.

(*b*) In the two American cases quoted above, the United States Supreme Court confirmed the defendants in their title to the property in certain consignments of hides and lead bullion acquired by purchase either mediately or immediately from the duly constituted military authorities of the Carranza Government of Mexico; the

Another method by which English judges have been called upon to express an opinion upon the status of the Soviet Government is illustrated by the case of *A. Gagnière & Co.* v. *Eastern Company of Warehouses, &c., Limited.*[1] There goods had been insured on transit from England to Russia by a policy containing a clause which protected the underwriters from "loss or damage caused by . . . persons taking part in . . . civil commotions."

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plaintiffs unsuccessfully asserting their title had been the owners of the property in question at the time of its seizure in 1918 and 1914 by Carranza's Generals, but the subsequent recognition by the United States of the Carranza Government *de facto* in 1915 and *de jure* in 1917 (of which facts the Court took judicial notice), retroactively validated the acts of that Government, and prevented the Court from examining the legality of the seizure.

(*c*) In so far as the gold may consist of British sovereigns and half-sovereigns, it is also worth remembering that according to English municipal law current coin of this realm is a negotiable chattel, and, if the transferee receives it in good faith without notice of a defect in title and for valuable consideration, he gets property in it, though the transferor had none. *Banque Belge* v. *Hambrouck* [1921], 1 K.B., at p. 320. Lord Mansfield in *Miller* v. *Race* (1791), 1 Burr. at p. 457, said: "In case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration." Consider also *Embiricos* v. *Anglo-Austrian Bank* [1905], 1 K.B. 677.

(*d*) Sir Robert Horne (then President of the Board of Trade) told the House of Commons on March 10, 1921, that the Law Officers of the Crown were of opinion that if the Russian Government was recognised as a *de facto* Government (as has happened) its gold was not subject to arrest in this country.

(*e*) In the Trade Agreement between His Majesty's Government and the Russian Soviet Government on March 16, 1921 (reproduced in *The Times* newspaper, March 17, 1921), "the British Government declares that it will not initiate any steps with a view to attach or take possession of any gold, funds, securities, or commodities, not being articles identifiable as the property of the British Government, which may be exported from Russia in payment for imports . . ." and further, "if, as the result of any action in the Courts of the United Kingdom dealing with the attachment or arrest of any gold, funds, securities, property, or commodities not being identifiable as the exclusive property of a British subject, consigned to the United Kingdom by the Russian Soviet Government or its representatives, judgment is delivered by the Court under which such gold . . . is held to be validly attached on account of obligations incurred by the Russian Soviet Government or by any previous Russian Government before the date of the signature of this Agreement, the Russian Soviet Government shall have the right to terminate the Agreement forthwith."

(*f*) In *Marshall* v. *Grinbaum* (*The Times* newspaper, July 14, 1921), Peterson J. decided that certain Russian gold roubles in specie, forming part of the gold reserve of the late Imperial Russian Government, and deposited with the Bank of England by the defendant as agent for, and on behalf of the Russian Soviet Government, were not subject to any claim or charge in favour of the plaintiffs as holders of Russian five per cent. bonds of 1906 and Deposit Notes; the decision rests on the terms governing the issue of these particular securities and not upon the grounds considered in the *Sagor* case, and the more direct question on the position of the gold of the Russian Soviet Government did not arise; but it would seem to go a long way towards settling the political uncertainty referred to in paragraph (*e*).

[1] *The Times* newspaper, April 30, 1921.

On arriving at the Custom House at Petrograd (the date of arrival does not appear) the goods were seized by persons purporting to act on behalf of the Soviet Government. Roche J. on April 30, 1921, held that the loss was not caused by :—

" persons taking part in civil commotions; however irregular were the proceedings of the emissaries of the Bolshevist Government, and however foreign to our ideas of justice, he had come to the conclusion that such proceedings were the authorised acts of the Government which was in fact in power at the time, and were not acts of civil commotion, but were acts of a Government, however irregular and rude in form it might be."

This clearly does not go as far as recognition, and it was not necessary to the judgment to go to that length; it was the domestic rather than the international status of the Soviet Government that was in question.

Similarly in the *Lomonosoff* [1] the Admiralty Court was asked to, and did in December, 1920, award salvage for the rescue of a Russian steamship from Bolshevist forces (who were attempting to overthrow the Government of Northern Russia) by certain British and Belgian officers and soldiers in February, 1920; Hill J. said that :—

" this Court, respecting the comity of nations, would never treat as a meritorious service the act of persons who in defiance of the laws of an established Government, recognised by and in friendship with this country, took a ship out of the lawful control of such a Government ";

but this case, though not the same as, was analogous to, a rescue from pirates or mutineers, which the Admiralty Court had always recognised as the subject of salvage.

An observation by Lord Stowell in the *Helena* [2] (cited by Sir Robert Phillimore in the *Charkieh* [3]) in reference to the Barbary States is apposite to the recent recognition of the Soviet Government of Russia and, by consequence, of its confiscatory decrees :—

" Although their notions of international justice differ from those which we entertain, we do not on that account venture to call in question their public acts. As to the mode of confiscation, which may have taken place on this vessel, whether by formal sentence or not, we must presume it was done regularly in their way, and according to the established custom of that part of the world."

Similarly in the *Sagor* case the argument that, even assuming recognition, the confiscatory decree " was, in its nature, so

[1] [1920], 37 T.L.R., 154.
[2] (1801), 4 C. Rob. at p. 5.
[3] (1878), L.R., 4 A. and E., 59.

immoral and so contrary to the principles of justice as recognised by this country that the Courts of this country ought not to pay any attention to it," was unsuccessful.

In matters of municipal law the English judges (doubtless encouraged by the almost impregnable position in which they are placed by the Act of Settlement) are very jealous of their independence of the Executive, and certain decisions of the last three or four years tempt one to think that the opportunity of rebuking the over-zealous bureaucracy of a Government Department is not entirely distasteful to them. But, as we have seen in the *Sagor* case, when they are called upon to administer that part of international law which is incorporated in our municipal law it frequently becomes their duty, not exactly to take instructions from the Executive, but to make inquiry of it upon facts of international status and to accept unhesitatingly the answer which they receive, and to apply it or the conclusion to which it gives rise. If the reply of the Executive is that recognition has been granted, then the Courts must follow suit; if, on the other hand, the reply does not categorically state whether recognition has or has not been granted, but consists of a statement of the relations subsisting between His Majesty's Government and the foreign society, then the statement of the facts is conclusive and the judge must draw his own conclusion from them. It is an axiom in international relations that a sovereign State cannot speak with two voices. For the Foreign Office to recognise a foreign community as a sovereign State, or a particular person or group of persons therein as entitled to act for that community, while the judges denied such recognition, would be an impossible situation.[1]

[1] *Note on the practice.*—There is no uniform rule as to the method by which the Courts inform themselves as to the view of the Executive in these matters, and at least four alternatives exist:—

(*a*) The judge directs the appropriate officer of the Court, *e. g.* the Senior Master of the K.B.D., or the Admiralty Registrar, to make inquiry of the appropriate Government Department, *e.g.* usually the Foreign Office, but occasionally the Colonial Office (*Mighell* v. *Sultan of Johore* [1894], 1 Q.B., 149) or the India Office (*Statham* v. *Statham and the Gaekwar of Baroda* [1912], P. 92). Frequently, however, the foreign Government has already addressed a claim for immunity to the British Foreign Office with the request that it may be endorsed and communicated to the Court (the *Porto Alexandre* [1920], P. 30). The Court will also allow to be read letters from the Foreign Office to the litigants defining the status of the foreign State or Government as recognised by His Majesty's Government (*e. g.* the *Sagor* case, *supra*).

(*b*) The Law Officers of the Crown will initiate proceedings (*e. g.* by means of an information and protest, as in the *Parlement Belge*) to claim the immunity of the foreign State, and will appear in support of that claim.

III. *Recognition* de facto *and* de jure.

Recognition of a new Government of a State may, it is said, be either of a *de facto* or a *de jure* Government. Internationally this distinction is substantial, because it makes it possible for the recognising State to "do business" with the other State without expressing any opinion upon the legality of its internal proceedings. Says Oppenheim [1]:—

"But it must be emphasised that recognition of a new head of a State by no means implies the recognition of such head as the legitimate head of that State. Recognition is, in fact, nothing else than the declaration of other States that they are ready to deal with a certain individual as the highest organ of a particular State, without prejudice to the question whether such individual is, or is not, to be considered as the legitimate head of that State."

But internally, as a matter of our municipal law, it is conceived that the distinction between recognition *de jure* and *de facto* is unimportant. So far as this country is concerned, either form of recognition is equally binding upon its Courts.

"The first and one of the principal grounds relied on by the plaintiffs is that the agreement of compromise was made on behalf of the *de facto* Government of the Republic which was not the *de jure* Government. But the Court is bound to take cognizance of the recognition of a *de facto* Government by the Government of this country, and it was admitted by plaintiffs' counsel at the bar that the *de facto* Government was duly recognised by the Queen. So soon as it has been shown that a *de facto* Government of a foreign State has been recognised by the Government of this country, no further inquiry is permitted in a Court of Justice here. The Court declines to investigate, and indeed has no proper means of investigating, the title of the actual Government of a foreign State which has been thus recognised. This attempted distinction between the *de facto* and the *de jure* Government which runs through the statement of claim is untenable." [2]

(*c*) The Court will, upon its own initiative, invite the Law Officers to appear and address the Court upon the status of the foreign State, and to communicate the view of His Majesty's Government. A statement in Court by one of the Law Officers is accepted as equivalent to a certificate from a Government Department (*e.g.* the *Gagara* [1919], P. 95).

There seems no doubt that the course adopted by Sir Robert Phillimore in the *Charkieh* (1873) L.R., 4 A. and E., 59, of examining the history and international status of Egypt from A.D. 638 to date was misconceived (per Lord Esher, M. R. in *Mighell* v. *Sultan of Johore*, *supra*, at p. 158); the opinion of the Foreign Office or other appropriate Government Department must be treated as conclusive and incapable of examination (*ibid.*).

(*d*) Where the sovereignty of the State in question is notorious (*e.g.* in the case of the United States of America), the Court will act *mero motu*, and take judicial cognisance of the fact (per Kay, L. J. in *Mighell* v. *Sultan of Johore*, *supra*, at p. 161).

[1] *Op. cit.* § 342.

[2] Per Chitty, J., *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. at p. 497.

At present the British recognition of the Russian Soviet Government is *de facto*, and it is submitted that, so long as that recognition lasts, the acts of the Soviet Government must be regarded in an English Court as the valid and unexaminable acts of a sovereign State as fully as if the recognition were *de jure*. The same reasoning would appear to apply to the case of recognition *de facto* of a new State.

IV. *The Extent of State Immunity.*

The next question that arises is the extent of the privileges and immunities granted by our Courts to the foreign State which, *mero motu* or after consulting the Executive, they decide to be a sovereign independent State.

As plaintiff the sovereign State is subject to the ordinary liabilities of a plaintiff to this extent, that security of costs may be ordered against it (as it is suing abroad), that a set-off may be pleaded against it (but not a counterclaim), and that it must comply with orders for discovery.[1]

But a foreign sovereign State cannot be made a defendant against its wishes.[2] It may, however, voluntarily submit to the jurisdiction and allow itself to be sued; moreover, instances are on record[3] where an English judge, particularly in the Admiralty Court, has been asked by a foreign State to act as arbitrator and award such sum against it as seems to him just.

Brett L. J. (as he then was), in delivering the judgment of the Court of Appeal in the *Parlement Belge*[4] in 1880, after fully examining the cases, summed up the principles of the judicial immunity of foreign sovereign States in the following often quoted passage :—

[1] See the *Annual Practice* (1921), Vol. I. p. 206. Instances of foreign States becoming claimants in the Prize Court are numerous, *e. g.* the Government of Prussia in the *Twee Gebroeders* (1800), (3 C. Rob., 162), the American Government in the *Anna* (1805), (5 C. Rob., 373), the Norwegian Government in the *Dusseldorf* [1920], A.C., 1034, and the *Valeria* [1920], P. 81; and where a capture has been made in violation of the territorial waters of a neutral power the property captured has been restored by a British Prize Court to the neutral Government, even though it was certain to be, and in fact was, at once handed over by the neutral Government to its enemy owners [1920], P. at p. 85. From the *Pellworm* [1920], P. 347, it is clear that in these circumstances the neutral Government is claiming not in respect of any proprietary right of its own, but merely in assertion of its sovereignty and of the right of the enemy owner on whose behalf restitution is demanded.

[2] *Mighell* v. *Sultan of Johore* [1894], 1 Q.B., 149.

[3] See remarks by Sir Robert Phillimore in *The Constitution* (1879), 4 P.D. at p. 45.

[4] 5 P.D. at p. 217.

"The proposition deduced from the earlier cases in an earlier part of this judgment is the correct exposition of the law of nations, viz., that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over *the public property of any State which is destined to public use*, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory and therefore, but for the common agreement, subject to its jurisdiction."

The personal immunity of the foreign State or sovereign from process need not detain us. The immunity of the public property of the foreign State or Sovereign is not so clear. Brett L. J. uses the expression (which we have italicised) "the public property of any State which is destined to public use." What does this precisely mean? Can it be defined more closely in the light of subsequent decisions? Is the statement of the foreign State that the property involved is public property conclusive? The growth of State-trading [1] makes an answer to these questions of daily increasing importance.

V. *State-owned Vessels.*

The species of public property which most frequently comes within the jurisdiction of the Courts of another State is ships, and it is not surprising to find that public ships have played an important part in the development and definition of State immunity. The earlier cases are fully examined by the Court of Appeal in the *Parlement Belge*,[2] and we may regard their judgment as establishing the following four points relevant to our present inquiry :—

(*a*) that the immunity is not confined to ships of war, but extends to other public ships the property of any sovereign State which are "destined to its public use," for example, in that case a mail packet in the possession, control, and employ of the King of the Belgians as reigning sovereign of that State;[3]

(*b*) That the immunity protects the foreign State not merely against process *in personam*, but also against the process *in rem* of the English Court of Admiralty.[4]

[1] Or, as Scrutton L. J. called it in the *Porto Alexandre* [1920], P. at p. 38, "the fashion of nationalisation."

[2] (1880), 5 P.D., 197. [3] At p. 217. [4] At pp. 217–19.

(*c*) That the declaration by a foreign State (communicated presumably through the British Foreign Office) that a ship is a public vessel of the State is conclusive upon an English Court and cannot be inquired into;[1]

(*d*) That "the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity."[2]

Another case of damage by collision, the *Jassy*,[3] which belonged to the Roumanian Government, and was carrying mails, passengers and cargo in connection with the Roumanian State Railways, illustrates the *Parlement Belge*, but does not add to it anything that is material from our present point of view.

A recent decision of Hill J., affirmed by the Court of Appeal,[4] has carried the immunity further, though not beyond the spirit of the judgments in the *Parlement Belge*. The Portuguese Government requisitioned a German vessel interned in a Portuguese port during the recent war, renamed her the *Porto Alexandre*, and handed her over to a "Commission of Services of Maritime Transports" (apparently a Government Department), who employed her in ordinary trading voyages earning freight for the Portuguese Government by carrying cargoes for private persons. At a later stage, and before the time material to us, she was adjudged by a decree of the Portuguese Prize Court to be a lawful prize of war; but whether this meant that she became the actual property of the Portuguese Government, or was merely subject to detention pending the conclusion of peace, is not clear. In the course of one of these voyages she went on the mud at the mouth of the Mersey, where she would have remained but for the salvage services of three Liverpool tugs. Their owners issued a writ *in rem* against "the owners of the Portuguese steamship *Porto Alexandre*, her cargo and freight"; the Portuguese Government moved to set aside the writ and all subsequent proceedings on the ground that the steamship and her freight "were and are the public national property of and/or requisitioned by, and in the possession and public use and service of the Portuguese

[1] At p. 219. See Hall, *op. cit.*, § 44: ". . . attestation made by the [foreign] Government itself is a bar to all further inquiry."

[2] At p. 220. Westlake, *International Law*, p. 265, puts it much higher by asserting that "the rights of a public ship . . . are no weaker when she is built, equipped, or employed for trade or any other peaceful purpose than when she forms a part of the military marine."

[3] [1906], P. 270.

[4] The *Porto Alexandre* [1920], P. 30.

Government," and supported their motion by a declaration by the Portuguese Chargé d'Affaires, communicated to the learned judge through the British Foreign Office, that the *Porto Alexandre* was "a State-owned vessel belonging to the Government of the Portuguese Republic."

In these circumstances Hill J. and the Court of Appeal (Bankes, Warrington and Scrutton L. J. J.) stayed the proceedings against the ship and freight, considering themselves to be bound by the *Parlement Belge*, and rejecting the contention that the declaration of the sovereign State must go so far as to assert that the vessel is employed in the public service or on public service. Scrutton L. J. suggested that there was another remedy, an extra-judicial one, namely, that State-owned ships might find themselves left on the mud on future occasions.[1]

VI. *State-requisitioned and State-chartered Vessels.*

Recent decisions have, however, carried the rule of the immunity of public ships a long way beyond the *Parlement Belge*. State commerce, particularly in time of war, is developing apace and, as we shall see, there is a danger lest the rights and convenience of the private subject may be sacrificed too readily and frequently upon the altar of international comity. But the remedy is with the legislature, not with the Courts.

The *Parlement Belge* was a State-owned vessel; the *Porto Alexandre* and the *Esposende* were stated to be and were assumed to be so. But how are we to treat vessels which have been chartered or requisitioned, or are in some other way in the possession and control of a sovereign State? In the *Broadmayne*[2] the Court of Appeal held that all proceedings for salvage against a British steamship must be stayed so long as she was under requisition by the Crown, and, per Bankes L. J., "it is . . . equally immaterial that the terms of payment and employment are incorporated in a charter party or other form of agreement."

[1] The decision in the *Porto Alexandre* follows the case of the *Esposende* (1918), Lloyd's List Newspaper Law Reports, February 18 and 25, 1918, where Hill J. set aside a writ *in rem* in proceedings for damage by collision (there being no arrest), and accepted as conclusive a statement by the Portuguese Chargé d'Affaires in London that "the *Esposende* is a public vessel belonging to the Government of the Republic of Portugal." Like the *Porto Alexandre*, she had formerly been German-owned and had been first requisitioned by the Portuguese Government and later condemned as prize.

[2] [1916], P. 64.

The ownership of the private owner is not divested by the requisition, but the ship is *publicis usibus destinata*, and the *Parlement Belge* applies. The proceedings were taken by a writ *in rem* against the owners of the *Broadmayne*, and the Crown came in as intervener. As soon as the requisitions came to an end, the stay would be removed and the action could proceed. In the *Messicano* [1] the same immunity was extended to the case of ships requisitioned by Allied Governments, and the arrest of an Italian ship under requisition by, and in the service of, the Italian Government in proceedings *in rem* for damage by collision, brought by the owners of a British ship, was set aside. "There is nothing," said Sir Samuel Evans P., "in the *Broadmayne* to say that you cannot bring an action *in rem* against a requisitioned ship. It merely decides that you cannot arrest."

Similarly, in the *Erissos*,[2] a writ *in rem* in salvage proceedings was issued against "the owners of the steamship *Erissos*, her cargo and freight," and it appeared that she was owned by Greeks, had been requisitioned by the British and Italian Governments (by arrangement between the British and Greek Governments), and had been assigned to the service of the Italian Government, for whom she was carrying coal; thereupon Hill J. set aside the writ *qua* the cargo, which was the property of the Italian Government, but not *qua* the ship, for "the writ so far as the ship is concerned is a good writ"; at the same time he ordered that all further proceedings in the action with a view to the arrest or detention of the ship should be stayed so long as she remained in the service of the British or Italian Government for public purposes.

The *Koursk*,[3] owned by the Russian Volunteer Fleet Association, was in collision; subsequently she came under the control and management of the British Government and was engaged upon war service; in these circumstances Hill J. refused to sanction the issue of a warrant for her arrest. But "the plaintiffs, of course, will have their maritime lien, and there may come a time when the vessel ceases to be in the use of the State for State purposes, and they can then enforce that maritime lien." There was no application to set aside the writ.

The *Crimdon* [4] was a Swedish vessel chartered by the United States Shipping Board Emergency Fleet Corporation (a corpora-

[1] (1916) 32, T.L.R., 519.
[2] Lloyd's List Newspaper Law Reports, October 23, 1917.
[3] *Ibid.*, June 19, 1918.
[4] (1918), 35 T.L.R., 81.

tion created by Act of Congress as an instrument for the operation of merchant shipping by the American Government, which was assumed to hold the entire capital stock of the corporation) and assigned by it to the United States Army Transport Service. While sailing under convoy the *Crimdon* came into collision with and damaged a Norwegian vessel. Hill J. applied the *Broadmayne*, the *Messicano*, and the other cases we have just discussed, and held that while the injured party might proceed with his action *in rem*, for what it would then be worth,[1] against the Swedish owners of the *Crimdon*, yet she could not be arrested while in the service of a sovereign State. So the method by which the vessel comes into the service of the foreign State, whether by requisition, as in the cases of the *Messicano*, the *Eolo*,[2] and the *Erissos*, or by charter-party, as in the case of the *Crimdon*, is immaterial.

But it appears to be essential, for this rule of immunity to apply, that the vessel requisitioned or chartered by the sovereign State should be employed in the public service of that or some other State.

Hill J. considered this point recently in two cases, the *Annette* and the *Dora*.[3] He was asked to, and did, entertain a possession suit in regard to these two vessels, which had been arrested in proceedings *in rem* by two Esthonian subjects claiming to be owners. The Provisional Government of Northern Russia moved to set aside the warrants of arrest and other proceedings on the ground "that the vessels had been sequestered or requisitioned by the Provisional Government of Northern Russia, and were running in the service of that Government." The vessels had been let out by that Government to a private partnership for the purpose of trading, but subject to the control of a Government official. Hill J. stated *obiter* that even if he had been satisfied that this Government was the Government of a sovereign State, the vessels were not in the possession of that Government nor in its use for public purposes, so that "the Court interferes with no sovereign right of the Government by arresting the vessel, nor does it, by arresting the vessel, compel the Government to submit to the jurisdiction or to abandon its possession."[4]

[1] It would not be worth very much, but the foreign owner might feel constrained to appear rather than allow judgment to go by default, for the rules "do not require the arrest of the *res* as a condition precedent to judgment by default" [in an action *in rem*], "(The *Nautik* [1895], P. 121), though until it is in the hands of the Court the decree has no practical value" (Roscoe, *Admiralty Practice*, 4th ed., 1920, p. 316).

[2] [1918], 2 I.R., 78. [3] [1919], P. 105. See also *supra*, p. 59.

[4] Some day it may be necessary to consider whether a ship which is merely "directed" by a sovereign State is immune from arrest. For the distinction between

The American Courts do not yet appear to have arrived at a uniform view upon the status to be accorded to State-requisitioned and State-chartered vessels.[1] On the one hand, there is a tendency to revive the *dictum* [2] of Sir Robert Phillimore in the *Charkieh* [3] :—

"No principle of international law, and no decided case, and no dictum of jurists of which I am aware has gone so far as to authorise a sovereign prince to assume the character of a trader; when it is for his benefit; and when he incurs an obligation to a private subject, to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character."

So in the *Attualita*,[4] the Circuit Court of Appeals for the Fourth Circuit, in a suit for damage to a Greek steamer done by collision in the Mediterranean, declined to exempt from jurisdiction an Italian merchant vessel requisitioned by the Italian Government and employed in the Italian Government service, but remaining under the control and management of her owner. On the other hand, in the *Maipo*,[5] the Southern District Court of New York exempted from seizure by Admiralty process "a naval transport owned by a foreign Government and in its possession through a naval captain and crew, although chartered to a private individual to carry a commercial cargo," and the writer of a recent article[1] regards this decision as being more in harmony with the general trend of American and British cases on the subject.

Professor F. P. Walton, in a recent article,[6] argues that however proper may be the application of the rule of State immunity affirmed in the *Parlement Belge* and the *Porto Alexandre* when the State is "a ruler," *i. e.* within the sphere of governmental acts, yet when the State is "a trader" the rule has no basis in convenience, and he draws attention to a tendency among French writers (though not in French Courts), and in the Belgian, Italian, and Egyptian Courts, to adopt the distinction and confine the rule of immunity to governmental acts.[7]

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requisitioned ships and "directed" ships, see *Stella Shipping Co.* v. *Sutherland*, Lloyd's List Law Reports, February 26, 1920, at pp. 294–7, and June 24, 1920, at pp. 74–6.

[1] See F. K. Nielsen on "The Law and Practice of States with regard to Merchant Vessels," *American Journal of International Law* (1919), Vol. XIII., p. 12.

[2] Which must be regarded in an English Court as discredited by the *Parlement Belge*, *supra*.

[3] (1873), L.R. 4, A. and E. at p. 99.

[4] 238 Fed. Rep., 909.

[5] [1918], 252 Fed. Rep., 627.

[6] *Journal of the Society of Comparative Legislation* (1920), Series III., Vol. II. p. 252.

[7] Oppenheim, *op. cit.*, § 450 (note 3), draws attention to Art. 281 of the Treaty of Peace with Germany, which denies to the German Government, if and when it engages in international trade, any of the privileges and immunities of a sovereign State.

VII. *Summary.*

In conclusion, it is submitted that the cases discussed justify us in formulating the following rules, so far as English Courts are concerned :—

(*a*) Recognition, whether of a new State or of a new Government of an old State, need not be absolute, but may be provisional and with all necessary reservations as to the future.

(*b*) Recognition of a new Government of an old State (and, *semble*, Recognition of a new State) is retroactive and validates for an English Court the official acts of that Government (and State) from the date when it established itself.

(*c*) Recognition by the British Government, whether of a new State or of a new Government of an old State, whether *de jure* or *de facto*, whether absolute or conditional, is conclusive upon an English Court, which will refrain from examining the official acts and conduct of the State so recognised.[1]

(*d*) An English Court will not exercise jurisdiction over the public property of a foreign State recognised by the British Government as a sovereign State, including ships which are claimed by that State to be its public property, whether actually engaged in the public service or not; such a claim is conclusive and unexaminable by an English Court; this immunity of public ships extends to proceedings *in rem* as well as proceedings *in personam*, and of course to arrest.

(*e*) Ships which are not the property of a foreign sovereign State, but are chartered or requisitioned by it, or otherwise in its occupation, may not be arrested by process of the Admiralty Court while subject to such charter party, requisition or other means of occupation; but proceedings *in personam* against the owner of the ship, and (apart from arrest) proceedings *in rem* are unaffected,[2] and a maritime lien or a judgment *in rem* may be enforced as soon as the occupation of the foreign State comes to an end.[3]

[1] See also as to Recognition generally three recent articles in the *American Journal of International Law* (1920), Vol. XIV. and (1921), Vol. XV., by Amos S. Hershey, and (1920) Vol. XIV., by Clarence A. Berdahl.

[2] Except in so far as the owner's vicarious responsibility for the acts and omissions of the master and crew may be affected by the external control.

[3] "The application (for immunity from arrest) in the case of requisitioned or hired ships should not be made by the owners, but by the interested Government. (The *Ononya* (1917), Fo. 355)," Roscoe, *op. cit.*, p. 298.

FREEDOM OF NAVIGATION ON THE RHINE

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[Translated by Annie A. Coath.]

I

WITH the close of the conflict from which it has but lately emerged, the world is devoting its energies to the task of reorganising the peaceful occupations of life.

For the re-establishment of normal and healthy economic conditions it is of the utmost importance that every effort should be made to revive the activity of commerce. No means must be neglected of facilitating commercial intercourse between nations. On this account the question of the navigation of waterways is worthy of the closest attention; for the development of river traffic opens up the prospect of a very material saving in the cost of transport as compared with the high price of carriage by rail.

The matter is one of peculiar interest to those countries whose export trade to-day is being hampered by the high rate of their exchange. In British commercial circles, indeed, the subject has been engaging attention for some time past, and it has been realised to the full what an advantage it would be to the British Isles if British goods could be dispatched by means of the Rhine in a single journey, without trans-shipment or other interruption, into the very heart of the Continent.

It will therefore, perhaps, not be inopportune to inquire in this paper into the juridical status of the Rhine as regards freedom of navigation.

II

In principle each State exercises control over that part of a waterway which is under its sovereignty, but the peculiar nature

of a river as a line of communication between States and as a means of access to the sea gives rise to a legitimate desire on the part, firstly, of the riparian States, and lastly, of all maritime States, to have a share in the benefits to be derived from its use. But to claim this as a right is to deny the legality of any measures by which a State may, to the detriment of other States, impede or prevent navigation on that part of the waterway over which it has control. The States primarily concerned are naturally those situated on the upper part of the river, which would, of course, be cut off from the sea if a monopoly of navigation were exercised by some State lower down, especially by the Power commanding the mouth of the river. It was the exercise of just such a monopoly by the United Provinces before the French Revolution which gave rise to the decree of November 16th, 1792—referring actually to the Scheldt and the Meuse, but expressed in quite general terms—by which the Provisional Executive Council of the French Republic declared that "no State can without injustice arrogate to itself a right to the exclusive use of a waterway to the deprivation of neighbouring States situated higher up."

In 1804 the Convention known as the *Convention de l'Octroi*, signed between France and the Empire, went so far as to declare the Rhine a river common to France and Germany in respect of navigation and commerce (Art. 2). It consequently established for the Rhine a common régime, especially in respect of the collection of authorised tolls. When Napoleon annexed the Low Countries this régime was extended to that portion of the river which flows through the Netherlands; in this way practical expression was given in international law to the principle that a waterway navigable to the sea and separating or flowing through the territory of several States represents in a sense a possession common to all, though each individually owns a part and exercises sovereignty over it. This principle was proclaimed in the following terms in Article 5 of the treaty of peace signed in Paris on May 30th, 1814:—

"The navigation of the Rhine, from the point where it becomes navigable to the sea, and *vice versa*, shall be free, so that it can be interdicted to no one; and at the future Congress attention shall be paid to the establishment of the principles according to which the dues to be levied by the States bordering on the Rhine may be regulated in the mode the most impartial and the most favourable to the commerce of the nations.

"The future Congress, with a view to facilitating the communication between nations, and continually rendering them less strangers to each other, shall likewise examine and determine in what manner the above provisions can be extended to other rivers which, in their navigable course, separate or traverse different States."

Two points are to be noticed about this Article 5 of the Treaty of Paris. In the first place, with regard to the Rhine, navigation is at the outset declared to be free to all, being forbidden to none. In the second place, having laid down this principle for itself as a new rule of international law, Article 5 proceeds to draw up a programme for the proposed Congress (the Congress of Vienna). It charges this Congress with a twofold duty, inviting it :—

1. To regulate in a way that shall be just and favourable to commerce the dues which may be levied in respect of navigation on the Rhine;

2. To arrange by suitable provisions for the extension to other European waterways of the freedom of navigation proclaimed on the Rhine.

In reality, the Congress of Vienna,[1] in spite of the strenuous efforts of the British delegate, did not succeed in establishing freedom of navigation on the Rhine, except in so far as it was to the profit of the riparian States. This limitation, among others, is reproduced in the Convention of Mayence of March 31st, 1831, which is a veritable code of regulations for the navigation of the Rhine. The right of navigating the Rhine to the open sea and *vice versa* without trans-shipment or unloading is only granted to vessels owned by subjects of the riparian States and belonging to the navigation of the Rhine. Article 3 of the Convention adds that only those vessels are regarded as belonging to the navigation of the Rhine whose masters or captains are provided with a licence; and according to Article 42 this licence will only be granted to recognised subjects of the riparian States.

However unsatisfactory this limitation may appear in view of the Treaty of Paris, it is only fair to recognise the merits of the Convention, as far as it goes. It provided the Rhine with a uniform régime applicable not only to its whole length, but

[1] *Rheinurkunden* ("Rijndocumenten"). This important collection of documents, published in 1918 (The Hague: M. Nijhoff) by order of the Central Commission of the Rhine, gives in the 1st Vol. (pp. 50 foll.) a complete *résumé* of the *procès-verbaux* of the Committee of Navigation.

See also on this point, as well as for the whole subject, the excellent work of Mr. G. Kaeckenbeeck, *International Rivers* (Grotius Society's Publications, No. 1, 1918), which gives a complete bibliography, including Engelhardt's work.

extended to those of its branches and tributaries which in their navigable course separate or flow through different States. Throughout the whole of this river system the new provisions secured, both as regards imposition of dues and administrative services and police, that uniformity and equality of treatment which the interests of commerce and navigation demand. The administration of justice is provided for by tribunals set up in each riparian State. By way of appeal the parties may, instead of applying to a judicial authority, equally well have recourse to the Central Commission. The Commission, in addition to exercising this judicial function, is the highest administrative body, and is charged with securing the fair and impartial application of all the regulations governing navigation on the Rhine. As regards navigability, it is incumbent on each State to keep in repair the towing-paths in its territory and, throughout the same extent, to maintain the necessary works in the channel of the river, so that no obstacle may be put in the way of navigation.[1] And it is the duty of the Central Commission to recommend to the proper authorities of the different riparian States the speeding up of works, either in the bed of the river or on the banks or towing-paths, both those which are advantageous to navigation as well as those which are indispensable to it.[2] As for the composition of the Central Commission, the international régime of the Rhine was regarded at that time as a régime common only to the riparian States; it was therefore natural that these States alone were represented on it. It was in connection with quite a different European river that further progress in this direction was made.

III

In accordance with the Treaty of 1814, the Congress of Vienna had a second task to fulfil, that of securing, if possible, the application to other international waterways of the principle of free navigation which had been applied at the outset to the Rhine. Instead of carrying out this mission in the spirit in which it had been entrusted to it, the Congress, having, in adopting the statute of the Rhine, put upon it the narrow interpretation which has been noticed, found it simpler and more convenient to borrow from it those clauses only which were

[1] Art. 7 adopted at Vienna. [2] Convention of Mayence, Art. 93.

capable of general application. These were incorporated in a chapter which formed the annexe to Article 15 and included Articles 108 and 117 of the final Act of Vienna. The application of these provisions to other rivers than the Rhine would have to be made the subject of further Conventions between the States interested.

It would be going beyond the scope of this essay to describe the way in which, by the Treaty of Paris of 1856 and the international Acts which followed it, the Great Powers established a régime of navigation for the Danube. Two points, however, are worthy of notice as marking a new stage in the evolution of international law in the matter of fluvial navigation.

The first is that freedom of navigation was in this case more completely established. The second—and in some respects the more important point—is that for the Lower Danube a "European Commission" was set up which was truly international in that it was composed of delegates not only from riparian States, but from other, maritime, States as well, summoned to represent the legitimate interests of third parties and to some extent of the Community of Nations as a whole. This European Commission, to which the Treaty of Paris granted only a temporary mandate, rendered services all the more significant when compared with those of the Riparian Commission of the Rhine, which, though invested with a permanent status, has shown itself powerless to carry out the task entrusted to it. The former Commission has carried on its activities ever since; its powers, which were extended by the Treaty of Berlin of 1878, were confirmed by the Treaties of Peace which ended the world war.

IV

The progress made in connection with the Danube could not fail to exercise an influence on the question of the Rhine. The Convention of Mannheim signed on October 17, 1868,[1] does not content itself with saying that navigation is to be forbidden to none "in respect of commerce";[2] it declares navigation to be free "to the vessels of all nations for the transport of goods and persons," and it adds that, subject to the regulations which are in force, "no obstacle of whatever sort is to be put in the way of free navigation."[3]

[1] Art. 1. [2] These words were relegated to the preamble.
[3] *Rheinurkunden*, Vol. II. p. 60; cf. also p. 107.

It goes even further. It abolishes all tolls based exclusively on the fact of navigation,[1] thus disallowing any connection between the obligation incumbent on a riparian State as regards upkeep and the tolls which it is authorised to collect. Hence it would seem that the new Convention was in fact establishing complete freedom of access to the Rhine for all ships and for all countries under conditions of perfect equality. Virtually, however, the sole difference was that navigation licences were no longer limited to nationals of the riparian States, but were granted to persons domiciled in the territory of any one of them. Nor did the Convention alter the character of the Central Commission, which continued to be the representative organ of the riparian States alone. Its exclusive character was further accentuated after the annexation of Alsace-Lorraine when it ceased to be composed, with the exception of a single delegate from the Netherlands, of any but representatives of German States.

It was a singular anomaly that Switzerland, a State having territory on the banks of the navigable part of the Rhine, should have been excluded from the Central Commission. The Rhine takes its rise in the Swiss mountains, and with its tributaries it forms in Switzerland a very important river system covering the greater part of the country. It is naturally navigable as far up as Bâle, and in several places the Convention of 1868 [2] makes use of the expression "from Bâle to the open sea" to denote that part of the river to which was applicable the uniform régime established by international law during the course of the nineteenth century. It is therefore clear that it is this entire course up to Bâle which is to benefit by the provisions of the Convention, and the rapidly increasing volume of traffic on this part of the river shows that even before the war it was of very real use to commerce.

Switzerland was early alive to the necessity of having some system of regulation for the river. But she came into collision with her powerful neighbour over this, and even quite recently, at a session of the Reichstag on May 8th, 1918, the representative of the Imperial German Government contested the right of the Swiss Confederation to invoke in favour of Switzerland the terms of the Convention of Mannheim.

[1] Art. 3. [2] Arts. 1, 15, etc.

V

Such was the régime of the Rhine prior to the Treaty of Versailles. Freedom of navigation had been proclaimed in principle; in practice restrictions had been imposed the scope of which has been the subject of divergent views as to the doctrine of international law involved, but whose actual existence cannot be denied.[1]

Meanwhile the principle continued to gain ground. At the Conference of Berlin of 1884–5 Prince Bismarck remarked with truth:—

"The Congress of Vienna, by proclaiming freedom of navigation on rivers which flow through the territories of several States, sought to prevent any monopoly of the advantages inherent in a watercourse. This principle has passed into international law, both in Europe and America."

Again, the Institute of International Law, at its meeting at Heidelberg in 1887, drafted a project codifying the regulations for fluvial navigation, taking this principle as its basis.[2] But it was left to the Treaty of Versailles[3] to bring about the practical application of the principle of perfect freedom of navigation to the rivers concerned, so that it has become an institution of general international law, and is no longer applicable to riparian States alone.[4]

To speak only of the Rhine, the Treaty does not modify as a whole the régime established by the Conventions of Mayence and Mannheim. The latter will remain in force until it is revised, and this revision ought to be set about with as little delay as possible. On the other hand, the Treaty does at the outset introduce two general modifications of very wide scope.

In the first place it entirely suppresses those provisions in the Act of Navigation of the Rhine which might be considered to be of a nature to obstruct the free navigation of vessels belonging to non-riparian States. In the terms of Article 356:—

"Vessels of all nations, and their cargoes, shall have the same rights and

[1] See Bonfils-Fauchille, *Droit International Public*, 1914, and Van Eysinga, *Evolution du droit fluvial international du Congrès de Vienna au Traité de Versailles* (Leyden: A. W. Sijthoff), p. 12. [2] Kaeckenbeeck, pp. 174 foll.

[3] On the Treaty of Versailles see, among others, Dr. H. Wehberg, *Die Fortbildung des Fluss-schiffahrtsrechts im Versailler Friedensvertrage* (Berlin, 1919).

[4] The reservation formulated in Art. 332, § 2 of the Treaty, is of too special a nature—both in itself and as regards the probable duration of its application—to detract from the truth of the general statement made above.

privileges as those which are granted to vessels belonging to the Rhine navigation, and to their cargoes.

"None of the provisions contained in Arts. 15 to 20 and 26 of the above-mentioned Convention of Mannheim, in Art. 4 of the Final Protocol thereof, or in later Conventions shall impede the free navigation of vessels and crews of all nations on the Rhine and on waterways to which such Conventions apply, subject to compliance with the regulations concerning pilotage and other police measures drawn up by the Central Commission.

"The provisions of Art. 22 of the Convention of Mannheim and of Art. 5 of the Final Protocol thereof shall be applied only to vessels registered on the Rhine. The Central Commission shall decide on the steps to be taken to ensure that other vessels satisfy the conditions of the general regulations applying to navigation on the Rhine."

By these clauses the Treaty practically puts an end to the régime which, in fact, amounted to a monopoly in favour of German boatmen. More important still is the modification brought about by the Treaty in the composition of the Commission. Not only does France again take her place in this Assembly, but Article 355 of the Treaty institutes an entirely new Commission composed of representatives of riparian and non-riparian States. Among the former, Switzerland now has a place on the Commission, for the Treaty recognises her right as a riparian State to have a share in the international administration of the Rhine. As non-riparian States, Article 355 nominates Great Britain, Italy and Belgium. In choosing these three countries the Treaty in the first place shows that it recognises the great interest which the free navigation of the Rhine has for each of these. But its intention is to give them an even more exalted *rôle*, as is shown by the following extract from the reply of the Allied and Associated Powers to the observations made by the German delegates on the Peace Treaty :—

"Delegates from non-riparian States are included in the River Commissions as well as representatives of the riparian States, in the first place as representing the general interest in free circulation on the rivers regarded as transit routes; and secondly, so that within the River Commission themselves they may act as a check on the strongest riparian State abusing her preponderating influence to the detriment of the others. For the same reason, in deciding upon the number of representatives allotted to each riparian State, the *great factor of freedom of communication must rank first.*"

VI

It may well be that conflicts will arise between the riparian States, especially now that side by side with the question of

navigation another problem has come to the fore, that of the utilisation of the waterway for water-power and other purposes. On this point the Treaty of Versailles [1] grants to France :—

"(*a*) The right to take water from the Rhine to feed navigation and irrigation canals (constructed or to be constructed) or for any other purpose, and to execute on the German bank all works necessary for the exercise of this right;

"(*b*) The exclusive right to the power derived from works of regulation on the river, subject to the payment to Germany of the value of half the power actually produced, this payment, which will take into account the cost of the works necessary for producing the power, being made either in money or in power, and in default of agreement being determined by arbitration. For this purpose France alone shall have the right to carry out in this part of the river all works of regulation (weirs or other works) which she may consider necessary for the production of power."

The extent of this double concession with regard to navigation is determined by the following stipulations in Article 358 :—

1. France "must comply with the provisions of the Convention of Mannheim or of the Convention which may be substituted therefor, and to the stipulations of the present Treaty (of Versailles)."

2. And—this is a much more precise reservation :—

"The exercise of the rights mentioned under (*a*) and (*b*) of the present Article *shall not interfere with navigability nor reduce the facilities for navigation*, either in the bed of the Rhine or in the derivations which may be substituted therefor, nor shall it involve any increase in the tolls formerly levied under the Convention in force. All proposed schemes shall be laid before the Central Commission in order that that Commission may assure itself that these conditions are complied with." [2]

In other words—and there is no ambiguity about this—the concession granted by Article 358 is subsidiary to the primary utility of the river, which above all must continue to serve for navigation from Bâle to the sea, under conditions of equal navigability throughout its course. It is this criterion which should be applied to the propositions to be submitted to the Commission for the execution of Article 358.

According to recent publications there is on foot a project to terminate navigation of the Rhine at Strasbourg. Water traffic up to Bâle would only be allowed by a lateral canal which, by means of its locks, would also serve for the storage of water-power.

[1] Art. 358. [2] Art. 358, § 2.

The Swiss Government is opposed to a solution of this kind.[1] For technical reasons the scheme is impracticable, since it would require the construction of works which it seems hardly possible to complete within half a century or more. It would be unpardonable in the meantime to prevent or neglect navigation on a part of the river which is naturally navigable.

Moreover, the canal could only be constructed at an enormous cost, computed at nearly two milliards of francs, if not more. This point is, on the whole, the concern of France, who would have to pay for the making of the canal, for it is important to note that according to the Treaty of Versailles she could not throw on the vessels navigating the canal the burden of defraying the cost of its construction. On the other hand, the operations necessary to bring the section from Bâle to Strasbourg up to the same level of navigability as the Lower Rhine, would cost at the most a hundred million Swiss francs, while a quarter of this sum would suffice for the most urgent works. The effect would be to increase tenfold the capacity of the Rhine for navigation.

Basing herself on these considerations, Switzerland, as a riparian State, asserts her right to navigate the Rhine on an equal footing with the other riparian States. In her eyes the advantages of her position would be entirely sacrificed if navigation on the Rhine were to be abolished in favour of a canal on which traffic could not develop freely. Besides, the construction of such a canal would be contrary to the very Statute of the Rhine itself, whose characteristic feature—unlike that of the Danube, for example—has been the establishment of unity of administration throughout the whole course of the river.

It does not come within the scope of the present work to investigate this problem, which is at present actually before the Central Commission. The main point, from the juridical point of view, is that the Treaty of Versailles has neither been able, nor has it wished, to impair rights which have already been acquired and sanctioned in the matter of navigation on the Rhine. The Allied and Associated Powers did not for a moment dream of violating the rights of the riparian States which are not

[1] Switzerland's position is dealt with in two numbers (in French) of the review *Schweizerland*, published at Zurich: "La Navigation fluviale" (July, 1918), and "De la Suisse à la mer" (Sept., 1920). See also J. Vallotton: *La Suisse et le droit de libre navigation sur les fleuves internationaux* (1914, Lausanne: Payot et Cie), and by the same author: "Du Régime juridique des cours d'eau internationaux de l'Europe Centrale," in *Revue de Droit International et de Législation Comparée*, 1913.

parties to the Treaty of Versailles. And the terms of the Treaty itself prove that they were far from wishing to take such a step.

The upkeep and development of navigation as far as Bâle is, in the first place, to the interest of non-riparian States. This has been fully understood by competent persons in the United Kingdom, as the following resolution proves, which was passed unanimously at the annual meeting of the Association of British Chambers of Commerce, which took place in London on June 16th to 17th, 1921 :—

"That this Association is of opinion that it would be to the advantage of British commerce if steps were taken to deepen the Rhine channel so as to enable large sea-going barges to ply direct to Basle.

"That His Majesty's Government should take steps to ascertain the practical possibilities of navigation on the Upper Rhine, in order that the British delegates on the International Commission may be in a position to support or oppose any proposals put forward in this connection; that while awaiting the announcement of the final policy to be adopted concerning the Upper Rhine, the navigability of the Rhine between Strasburg and Basle should be at once improved, as in this part even the normal amount of navigation has become difficult, owing to the river having been here allowed to get into an unsatisfactory state; and that the attention of His Majesty's delegates on the Commission should be specially directed to this latter point." [1]

From what has been said it does not follow that Article 358 of the Treaty of Versailles is likely to remain a dead letter. It rests with the Central Commission to do justice to the interests which this Article has taken into account by safeguarding navigation over the whole course of the Rhine in its entirety.

VII

The Treaty of Versailles gives rise to another declaration which is worth noticing. In declaring the Elbe, the Oder and the Niemen to be international rivers for a large part of their course, and in applying to the Upper Danube as far as Ulm an international régime of navigation, the Signatory Powers have recognised the necessity for drawing up, with regard to these rivers, a series of general stipulations, which figure in Articles 332–337. But according to Article 338 the régime thus established is only provisional. It :—

[1] See also *History of the Port of London*, by Sir Joseph G. Broodbank (1921, London), pp. 494–5.

" shall be superseded by one to be laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognised in such Convention as having an international character."

This is not the case with regard to the Rhine. It is true that in Article 354, § 3, the Treaty of Peace provides for a speedy revision of the Convention of Mannheim, and adds that the project of revision to be drawn up by the Central Commission shall be " in harmony with the provisions of the General Convention . . . should this have been concluded by that time." But this does not deprive the revised Convention of its character as an Act applying peculiarly and especially to the Rhine. As a matter of fact, Article 354 of the Treaty actually stipulates that in the event of any conflict between the existing Convention of Mannheim and the General Convention provided for in Article 338, the provisions of the latter shall prevail from the time when they come into force. But a closer examination of the present situation will suffice to prove that this stipulation could hardly be put into effect.

In the first place there might be some difficulty in identifying the General Convention to which the Treaty refers. According to Article 338, the General Convention is to be drawn up by the Allied and Associated Powers, and approved by the League of Nations. In reality it was elaborated by a conference summoned at Barcelona in the spring of 1921 by the League of Nations in accordance with Article 23 (*e*) of the Covenant of the League. At this Conference forty States were represented, not to speak of the delegates from Germany and Hungary, who took part in a consultative capacity.[1]

It seems certain that in spite of this discrepancy the Convention and the statute governing the régime of navigable waterways of international interest, which were adopted at Barcelona, constitute in the eyes of all the States the General Convention referred to in the Treaty of Peace.

As to § 2 of Article 358, it is doubtful whether it could be enforced literally. It should be noticed that the immediate supersession which it provides for in favour of the new Convention of Barcelona could only be applied to the existing Convention of Mannheim, and not to the provisions drawn up by the Treaty

[1] Cf. *La Conférence de la Société des Nations à Barcelone, texte complet des conventions et recommandations adoptées, précédé d'une introduction* (1921, Geneva: Payot et Cie).

of Peace itself. On this point the Convention of Barcelona is absolutely explicit. It declares in Article 2 that it does not dispute the rights and obligations arising from the provisions of the Treaty of Peace, or the provisions of other analogous treaties, in matters concerning the Signatory Powers and the beneficiaries of these treaties.[1]

As to the existing Convention of Mannheim, which alone could be the subject of the supersession provided for in § 2 of Article 358 of the Treaty of Peace, any attempt to carry this provision into effect would meet with an obstacle of no mean importance. For the Convention of Mannheim is a permanent contract which cannot be annulled by the mere denunciation of one of the contracting parties, and these parties include not only the riparian States, but also the other Powers summoned to sit on the Central Commission.

Quite the opposite is the new Convention of Barcelona, as regards both these points. It is to come into force as soon as five Powers have ratified it.[2] It may be acceded to by all Members of the League of Nations, and other States may even be invited to adhere to it (Art. 6). It is possible, strictly speaking, that these five Powers might not be among those represented on the Central Commission of the Rhine. Here, at the outset, would be an anomaly which would hardly be acceptable. But what is more important still, is that the Convention of Barcelona may be denounced by each Signatory Power on the expiration of five years from the day on which it came into force for that Power. In other words, the Convention is one which may be denounced, and this immediately raises the question of what the effect of this denunciation would be on the provisions of the said Convention, which, according to Article 354, § 2, of the Treaty of Peace, should of right have superseded those stipulations of the Convention of Mannheim which are not in harmony with it. It is easy to see what an impossible situation would arise in the event of such a denunciation on the part of a riparian State if Article 358, § 2, were to be applied literally. It is certain that the High Contracting Parties to the Treaty of Peace did not wish to bring about such a vexatious state of affairs, nor did they even conceive the possibility of such a contingency. Consequently this clause of the Treaty of Peace

[1] The same thing is stated in the "Wishes" expressed by the Conference, No. 13.

[2] Art. 6.

could hardly be put into practical effect. It would be useless to enter further into the provisions of the Convention of Barcelona and the statute relating to navigable waterways of international interest. It will be sufficient to add that, true to the desire for progress shown by Article 23 (*e*) of the Covenant of the League of Nations, the Statute of Barcelona expresses the desire of its authors not to curtail in any way the facilities and rights already secured by the existing régime of the international navigation of rivers; on the contrary, they desire to increase the advantages already acquired. It was this same progressive spirit which inspired the declaration by which the flags of all nations which have no sea coast are recognised when they are registered in a place on their own territory, which is to be specially selected for the purpose and which will henceforth constitute a port of registration for these vessels.

VIII

It is to the interest of all that navigation on an international river shall not be interfered with even in time of war. For this reason various international treaties contain stipulations providing a régime of neutrality for these rivers.

As regards the Rhine, the so-called *Convention de l'Octroi* of 1804 contained a clause to this effect, which was adopted first by the Act of the Congress of Vienna, and later by the Convention of Mayence, Article 108 of which runs:—

> "If it should happen (which God forbid) that war should break out among any of the States of the Rhine, the collection of the tolls shall continue uninterrupted, without any obstacle being thrown in the way by either party. The boats and officials in the service of the tolls shall enjoy all the privileges of neutrality. Guards shall be provided for the safes and offices belonging to the tolls."

The above clause does not in the least proclaim neutrality for navigation as such. It simply aims at safeguarding the financial interests of the riparian States. The Convention of Mannheim did not retain this clause and the Treaty of Versailles makes no reference to the neutrality of navigation on the Rhine in case of war. The Conference of Barcelona, however, realised the importance of the question, for it adopted the following rule, incorporated in Article 15:—

"The present Statute does not define the rights and duties of belligerents and neutrals in time of war; nevertheless, it is to hold good in time of war as far as is compatible with these rights and duties."

In sympathy with this stipulation, the Convention further expressed the wish that :—

"the League of Nations should as soon as possible invite its members to meet, with a view to elaborating new Conventions for the purpose of defining the rights and duties of belligerents and neutrals in time of war in the matter of transit."

PRIZE COURT PROCEDURE

By E. S. ROSCOE,
Registrar of the Admiralty and Prize Court.

GREAT BRITAIN and the United States are the only nations which have a purely judicial tribunal as a Prize Court. In England it is formed by the Probate, Divorce and Admiralty Division of the Supreme Court, in the United States by a District Court. In each country there is an appeal to the highest tribunal—to the Judicial Committee of the Privy Council and to the Supreme Court, respectively. When the complexities of modern commerce are borne in mind and the difficult legal questions, whether of fact or law, which arise in regard to the ownership and the destination of goods, it may be confidently asserted that a legal tribunal only can do justice between belligerents and neutrals. The mixed prize tribunals which are to be found in other countries were perhaps sufficiently efficient under earlier conditions, but to-day they are anachronisms.

It results from the fact that Great Britain and the United States have a judicial Prize Court, that they have a definite procedure applicable to the Court. But there is this difference between the two procedures—one is modern, the other, in some respects, old-fashioned. The course of Prize Court procedure in England can be stated shortly, before the present procedure is critically examined.

Like all procedure in its earliest form, that of the Court of Admiralty as a Court of Prize was of a rudimentary kind. The first rules of procedure were, apparently, those formulated by Orders in Council in 1665, of which Sir Leoline Jenkins was probably the main draftsman, and which were nine in number.[1] They are very elementary and slight, containing, as regards procedure properly so called, but a few unimportant definite directions, such as the announcement at the Exchange or other public place that persons may enter claims for prize, that adjudication may take place fourteen days after such notice, that

[1] *Law and Customs of the Sea*, edited by R. G. Marsden (1915–16, London: Navy Records Society), Vol. II. p. 53.

perishable property may be sold, and that, if a claim seems fraudulent, security for costs may be demanded. This regulation was based on an Order in Council of June 25, 1627, that claimants should pay double costs and damages if their claims were found to be fraudulent, and suffer prosecution in the Star Chamber.[1]

It should, however, be borne in mind that the general ecclesiastical procedure was applicable to the prize as well as to the Instance jurisdiction of the High Court of Admiralty, so that definite prize rules were required only to deal with some matters of a technical character peculiar to the prize jurisdiction of the Court.

During the wars of the eighteenth century, before the war with Russia in 1854, Prize Court procedure was regulated by isolated rules made by the judge, some of which are collected in Marriott's *Formulare*, published in 1802, and by an understood practice. In a Statute known as the Prize Act, (Russia),[2] procedure was to some extent formulated. After the repeal of this Act in 1864 by the Naval Prize Acts Repeal Act [3] procedure was still more carefully set out by the Naval Prize Act, 1864.[4]

In 1898 an Order in Council promulgated a complete code of Prize Rules issued under the provisions of the Naval Prize Act, 1894,[5] sec. 3. These rules codified the old practice of the High Court of Admiralty in Prize, with some additions, and very clearly exhibit the main features of the ancient procedure. Their interest is now largely academic, for they were never in force in time of war. On August 5, 1914, the existing Prize Court Rules were issued under an Order in Council of that date. They are noteworthy in the history of English law, because they finally conclude the connection of ecclesiastical procedure with the Municipal Courts of England. That connection, so far as concerned the Instance jurisdiction of the Admiralty Court, came to an end when the Rules of the Supreme Court, 1883, came into force. The Prize Rules of 1914 were thus the inevitable result of the Rules of 1883.

The object of a procedure in prize is that the rules should, in the quaint language of the unknown compiler of Marriott's *Formulare*, be " plain modes of discovering truth and of bringing to a hearing maritime cases in which British and foreign subjects

[1] *Ibid.*, Vol. I. p. 406.
[2] 17 and 18 Vict. c. 18.
[3] 27 and 28 Vict. c. 23, S.1.
[4] *Ibid.*, c. 25.
[5] 57 and 58 Vict. c. 25.

are equally interested." It is by this test that the present rules should be judged. If they answer it, then it is clear that there has been a continuous improvement in British prize procedure, contemporaneous with changes in commerce and with changes in prize law itself.

The main feature of the former English prize procedure was that the captor must prove his case from the ship's papers and from the documents found on the ship relating to the cargo and from the answers to "standing interrogatories" which were administered to the crew. It is clear that such a procedure is applicable only to a primitive commercial state, and that it is quite out of keeping with modern conditions. It is true that, under special circumstances, further proof was allowed by the Court, but this resulted in two hearings and in increased expense and delay.

When the actual maritime destination of the ship was regarded as the destination also of the cargo, the documents found on the vessel formed the materials for a *prima facie* case for condemnation or release. But to-day a procedure which was effective enough in the eighteenth century would reduce Prize Court proceedings to a farce. The celebrated *Memorandum* of Murray (Lord Mansfield), Dr. Lee and others, which stated, among other things, that if there does not appear from the papers taken from the ship "ground to condemn as enemy property or contraband goods going to the enemy, these must be acquitted; unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into further proof thereof," was written in 1753, more than a century and a half ago. Yet this *Memorandum*, and judicial decisions analogous to it in substance, and more or less contemporaneous, are still cited by some learned writers as containing unchangeable rules. Movement in prize procedure is as necessary as in any other kind of legal procedure. In an interesting paper in a recent number of the *Yale Law Journal*,[1] Professor Baty, after advancing the view that the modern prize procedure is improper, is obliged to admit that "the conception of continuous voyage requires captor's evidence to make it effective," in other words, he would retain an obsolete procedure, though by so doing the law would be defeated. Further, it should be noted that the old procedure was based on the idea that justice could be done on the evidence furnished by the ship's

[1] Vol. XXX. p. 34.

papers, though, if these were doubtful, a more elaborate trial could take place. But if commerce and law have changed so much that the trial of a case on ship's papers only could not be satisfactory, the exception allowed by the judges of the British Prize Court in past times, which implied that the standing practice was not always sufficient, would clearly show that these judges, if they could re-visit their Court to-day, would not be satisfied with a general procedure which was suitable only to the law and commerce of their age. This appears to be the view of the Privy Council, for in the judgment of that Court in the *Edna*[1] (March 18, 1921) there is to be found the following interesting and illuminating passage :—

"The likelihood of further evidence of value being obtainable was so small in proportion to the delay that it would involve, as to disincline the Court to allow a more remote investigation than the examination of the ship's papers and the administration of the standing interrogatories already provided for. Now, however, under modern conditions, when the facilities for ascertaining the truth by subsequent investigation and the introduction of various kinds of evidence make even a considerable delay so well worth incurring, it can hardly be doubted that the same judges would have freely exercised their discretion in the contrary direction. This would be peculiarly so if the question in debate were the validity and genuineness of the ship's apparent nationality."

In some respects even in this judgment the frequency of hearings in former times on further evidence than was contained in the ship's papers and in the answers to standing interrogatories is not sufficiently recognised. For there were two distinct forms of further hearings, one on affidavits and one, more rarely employed, by plea and proof. Hearings on further affidavits were common, and, had the old practice continued, they would, from the nature of modern commerce and the condition of the law, have been the rule rather than the exception. This view is illustrated by a judgment of Lord Stowell. In the *Maria*[2] he said, "I think that the claimant may in this case be admitted to prove the averment of an intention of selling in America, which is not shown to be incredible or inconsistent with any circumstance which is at present in evidence before me." An intention of selling in Germany was a point constantly at issue in recent prize cases, and the authority of Lord Stowell might well be invoked as approving of the modern practice.

[1] L.R. [1921] 1. A.C. 735.

[2] *English Prize Cases*, edited by E. S. Roscoe (1905, London: Stevens & Sons, Ltd.), Vol. I. p. 495; 5. C. Robinson, p. 365.

When further evidence was allowed on behalf of the claimant it was in the discretion of the Court to allow the captor to file counter evidence.[1] But, taking the general practice to be that the hearing was on ship's papers and on answers to standing interrogatories, this is no reason why it should not have been altered. The fact is that because a procedure existed appropriate enough to its time, various legal writers still regard it as if it were something sacred and unchangeable, whereas its basis was that which should be the object of all procedure—convenience and utility judged by contemporary standards—exactly as these same elements are the basis of the modern procedure.

The radical part of this procedure is contained in Order XXV, Rule 2 of the Rules of 1914, which permit the case to be heard not only on the ship's papers, but upon the affidavit of the officers of the capturing ship, depositions, if any, of witnesses examined before the hearing and tendered on behalf of any party, evidence of witnesses from any party at the hearing and further evidence, if any, admitted by the Judge. The result is that any evidence, either by affidavit, of witnesses given *vivâ voce*, or documentary, which is material to the issue, is admissible. The widest range of proof is, in fact, allowed both to captors and claimants. This extension of proof is clearly in consonance with the general trend of change throughout the whole of English law. It is unnecessary to give actual examples of this tendency, but every lawyer knows that in the Criminal Courts prisoners are now allowed to give evidence on their own behalf. It may be fairly asked why should the Prize Court lag behind the Municipal Courts of the country in this respect?

It necessarily follows that if each party—captor or claimant—is to have all the evidence that is necessary there must be means of obtaining discovery of documents. At the present time, without discovery, it would, in the case of contraband, be almost impossible for a captor to prove his case. This important necessity was clearly pointed out by Lord Parker in the *Consul Corfitzen* [2]:—

"The goods having been shipped in a neutral vessel, and ostensibly destined for a neutral port, can only be contraband of war if, on the principle of continuous voyage, and according to the real intention of the parties concerned in the transaction, they had a further or ultimate destination in an enemy country. Intention is rarely the subject of direct evidence. As a rule it has to be inferred

[1] See the *Adriana*, 1. C. Robinson, p. 313. [2] L.R. [1917] A.C. 555.

from surrounding circumstances, and every circumstance which could, either alone or in connection with other circumstances, give rise to an inference as to the intention of the parties concerned in a transaction, both relates and is relevant to the question what that intention really was.

"In the present case one of the matters in question is how the appellant intended to dispose of the goods to which these proceedings relate after their delivery at Karlskrona. Were they intended by him for consumption in Sweden, or had they a further destination, and if so, in what country? It appears to their Lordships to be beyond dispute that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war, and in particular from the volume of his trade with Germany before and since such outbreak. All documents which throw light on these matters must therefore fall within the principle laid down in the case above referred to. The order for discovery being limited to documents which may throw light on the nature and course of the appellant's business and the volume of his trade with Germany for some months before the war and since the outbreak of the war, it is in their Lordships' opinion impossible to hold that the order was wrong in law."

In the same judgment it was also pointed out "that full and complete discovery by the claimant may be the best and readiest mode of establishing his own case, if it be a good one," so that we get to this point—that it is to the interest both of the captor and of the claimant that there should be a full disclosure of documents—in other words, justice is not complete without it.

If the working of Order IX be noted, it does not seem to an impartial observer that it has had harsh results. That it has necessitated delay in the bringing of causes to trial seems its worst defect. Full information from a foreign country cannot be quickly obtained in time of war, and, consequently, a regrettably long time has often elapsed between the beginning and the end of a cause. It is equally certain that the giving of the requisite information has been a serious inconvenience and expense to neutral claimants. But the right of a belligerent to seize property at sea is an act in itself inconvenient to neutrals, and the obligation to make full documentary disclosure is, after all, only a secondary result of a basic right of a belligerent, accentuated, no doubt, both by the extension of Prize Law and by the intricacy of modern commercial transactions. In fact it is difficult to see how, if the practice was to be effective, it could be less extensive than it has been in the late war. The working of any such practice must be judicially controlled, and the danger which springs from it is that in countries where there

is not the same judicial control of prize proceedings as in England its exercise might be exceedingly arbitrary.

Unquestionably the practice of discovery increases the cost of prize proceedings, and thus it leads to a consideration of the question of security for costs. Under Order XVIII, Rules 2 & 3, a person making a claim and being ordinarily resident out of the jurisdiction of the Court may be ordered to give security for costs, and the security may be of such amount as the Judge shall direct. Under the Naval Prize Act, 1864, sec. 23, a claimant was obliged within five days after entering a claim to give security in £60, but the Court had discretion to increase the amount. The practice of the Prize Court was not to condemn claimants in costs unless their conduct had been "grossly fraudulent." [1] Thus, in effect, the payment of costs is a penalty for attempts to deceive the Court, not as in ordinary litigation a means of indemnifying a successful litigant against pecuniary loss by the proceedings. That being so, a fixed sum for security is better than one which ostensibly is intended to cover the costs of litigation. To fix an amount of security is difficult, and in practice the value of the particular *res*, whether ship or cargo, became during the late war the chief test of the amount of security. As in nearly every case the claimant was a foreigner, security for costs was required by the Crown, but a uniform amount as under the Act of 1864 would be fairer to claimants, and diminish in some trifling degree the cost of the proceedings. The policy, however, of security is doubtful. It is a charge against neutrals at the beginning of the proceedings, one which it is difficult for them to understand. It is true that without security the Crown would not recover costs, but where a ship or cargo is condemned the proceeds would bear the costs, and these would have a very small relation to the amount of such proceeds. As a penalty the payment of costs has no force. Ships or goods having been seized by a belligerent, any one who considers that he has a claim to them does, and always will, take every means in his power to obtain their release. The seizure of neutral property is an act of violence, necessary, no doubt, to the cause of the belligerent, but none the less a serious inconvenience to neutrals who are entitled to trade with a belligerent. If the latter obtains the neutral goods by a decree of condemnation after a seizure, the fact that the belligerent has pecuniarily benefited by the seizure

[1] See J. Story, *Notes on the Principles and Practice of Prize Courts* (Pratt's Ed.)

seems to be sufficient without making the neutral pay for the costs of the litigation.

The question of pleadings cannot be omitted from a review of the procedure of the Prize Court. Order VIII, which deals with the subject, is, in fact, based on the former practice of the High Court of Admiralty, which was to allow a further hearing on plea and proof in exceptional cases. Under the existing rule a party instituting a cause or making a claim shall, if ordered by the judge, file a petition (Order VIII, Rule 1). Permission to plead therefore can now be given by the Court, just as it could under the old practice, but with this difference, that formerly a preliminary hearing must precede the order for plea and proof. In many instances orders which, by rules of procedure, are intended to depend on the judgment of the Court after consideration of particular circumstances, become, in practice, orders of course. This might easily have happened under the provisions of Order VIII. But in practice the result has been in the opposite direction, and there have been no pleadings in prize causes, because, at the very commencement of the sittings of the Court in 1914, the late Sir Samuel Evans refused to make orders for the delivery of pleadings, as this procedure was, in his opinion, unnecessary. This view has resulted in all prize causes being tried without pleadings, so that in this respect the modern practice, as carried out under three Presidents, is more limited than the old practice. It may be taken as a principle of procedure that the fewer steps there are between the commencement of a cause of any kind and its decision, the better. This principle is conspicuous in British prize procedure, and, although many prize causes have raised difficult commercial points, the absence of pleadings has not, on the whole, proved detrimental to the efficient trial of causes. It indicates also that a practice of requiring pleadings as a matter of course is based on a wrong assumption, which is that one party does not know the points upon which the other relies, and that it is impossible to try a case satisfactorily unless the points on which the case of each party depends are placed before the Court in black and white. The practice of the Prize Court for eight years has proved that written statements of opposing cases are not generally necessary for the satisfactory trial of an issue. This fact suggests to the observer of English procedure the question whether pleadings in civil actions in municipal courts should be

generally required, whether indeed they should only be allowed in exceptional cases. But to consider this interesting and important subject would be to go beyond the scope of this article.

It is impossible after a review of the main characteristics of modern English Prize Court procedure not to have forced on the mind the necessity for a uniform procedure in all national Prize Courts. The jurisprudence which guides the decisions of Prize Courts throughout the world is more or less identical, and it is to the advantage alike of belligerents and of neutrals that the procedure in these Courts, whatever be their nationality, should be identical. The modern procedure, embodied in the Rules of 1914, has guided not only the British Prize Court in London, but other British Prize Courts which are to be found all over the globe. It may fairly be claimed to be simple, efficient and just, and capable of adoption by any legal tribunal. It thus affords precedents for a procedure common to all national Prize Courts, which, having regard to the intricate questions of fact and difficult points of law which necessarily arise under modern conditions, should be purely legal tribunals.[1]

[1] This article has been confined to the procedure of the Prize Court, and no reference has been made to the procedure of the Appellate Court—the Privy Council. The procedure in prize appeals to the Privy Council is similar to the procedure in other appeals to that tribunal. So far as regards prize appeals, there seems to be no reason why the simple and economical procedure which prevails in Admiralty appeals to the Court of Appeal should not be equally satisfactory in prize appeals.

THE ROLL *DE SUPERIORITATE MARIS ANGLIAE*

THE FOUNDATION OF THE STEWART CLAIM TO THE SOVEREIGNTY OF THE SEA

By T. C. WADE, M.A., LL.B.

THERE have been two periods in the history of England in which the English kings claimed to be sovereigns of the surrounding seas: the later Plantagenet and the Stewart period, the former embracing the hundred years covered by the reigns of the first three Edwards, and the latter extending over the greater part of the seventeenth century. The Plantagenet claim did not affect foreign policy to any appreciable extent, but that of the Stewarts entered deeply into the political history of their time. It was the subject of prolonged diplomatic correspondence; it was one of the principal causes of three wars with the Dutch, and was made one of the pretexts of a war with France [1]; it was the subject of numerous official reports and of a long series of pamphlets; and it gave rise to the great controversy on the Sovereignty of the Sea which M. Nys has aptly called *Une Bataille de Livres*.[2]

The question of the Freedom of the Sea has been revived in a form entirely different from that which it took in the seventeenth century, for the rights of belligerents on the sea, either against enemies or neutrals, have no relevancy to the *Mare Liberum* and *Mare Clausum* controversy. Still it will be of interest, from a historical, if not from a juridical standpoint, to consider the historical foundation on which the obsolete Stewart claim was built.

In the Record Office in London there is an interesting roll, consisting of sixteen membranes, entitled *De Superioritate Maris Angliae et jure officii Admirallatus in eodem*.[3] The documents, written some in French and others in Latin, are in the hand-

[1] Declaration of War by William III and Mary against the King of the French. Dumont, *Corps diplomatique*, Vol. VII., Part II. p. 230.

[2] Nys, *Études de Droit international et de Droit politique* (2nd Ser., 1901), p. 260.

[3] Chancery Misc., 32/19.

writing of the early fourteenth century, and appear to have been collected after the consultation on maritime laws which Edward III had with his justiciars in 1338. From their tenor it seems not unreasonable to conclude that they were brought together into one roll with the view of affirming the right of the Crown to the superiority of the English seas. They all deal with maritime matters, and most of them contain definite statements of the sovereignty of the king over these seas. It was largely on these documents, and on a few other records of the same period, that the Stewart and Commonwealth claim relied.

When Charles I was contemplating the revival of the almost forgotten pretension of his early predecessors, and the raising of the ship-money fleet, he thought it wise to examine the grounds on which his claim rested. He therefore called on Sir John Boroughs, the Keeper of the Records, to prepare a memorandum setting forth " the true State of the Question concerning the Dominion of the British Seas, as well what Histories as our own Records would afford." [1] Boroughs had recently come upon the old Plantagenet roll and had realised its significance, and it was first brought to notice in the memorandum which he prepared. His treatise was written in Latin in 1633, and was at once translated into English, although the book itself was not published till 1651, when the English version was printed with the title " The Soveraignty of the British Seas." The Latin manuscript, however, was available to Selden, who made extensive use of it in 1635 when he revised his *Mare Clausum* for publication, and he, like all subsequent writers on the English side of the controversy, refers repeatedly to these old records.

The most striking document in the Roll is the complaint presented, or intended to be presented, by the procurators of several of the principal maritime Powers of Europe—Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark and Norway—against Reyner Grimbald, who, as Admiral of the French, had seized certain shipping on the sea during the peace between England and France, which followed on the Treaty of 1303. While the fact that the depredations occurred when the nations were at peace is duly emphasised, what specially concerns us is that it is definitely stated—to use the words of Boroughs' translation—that :—

[1] Sir John Boroughs, *Soveraignty of the British Seas* (1920 ed., Edinburgh, W. Green & Son, Ltd.), Preface, p. 41.

"the Kings of England, by reason of the sayd Kingdome, from time whereof there is no memory to the contrary, have been in peaceable possession of the Dominion of the Sea of England, and of the Isles being in the same, in making and establishing Lawes and Statutes, and restraints of Armes and of Ships otherwise furnished then to Ships of merchandize appertaineth, and in taking suretie and affording safeguard in all cases where need shall be, in ordering of all other things necessary for maintaining of Peace, Right and Equity, amongst all manner of people, as well of other Dominions as of their owne, passing through the said Seas, and the Soveraign guard thereof, and in doing Justice, Right and Law according to the said Lawes, Ordinances and Restraints, and in all other things which may appertaine to the exercise of soveraigne dominion in the places aforesayd." [1]

Here, it is contended by the seventeenth-century advocates of England's claim, is a definite acknowledgment by nine foreign States of the king's right of sovereignty over the sea, as early as the beginning of the fourteenth century. Boroughs, after quoting the document, adds:

"Surely I beleeve no Prince in the world can produce clearer evidence for any part of his estate then the King of England by this Record can doe for his Soveraignty and exclusive Jurisdiction in the Sea of England." [2]

This conclusion, however, is not justified by the record itself. It was evidently intended that each of the States concerned should present its complaint in the same terms, and the five copies extant in the roll were, no doubt, meant for the use of five of the States mentioned. The documents, however, are only drafts, and the likelihood is that they were prepared by English lawyers and handed to the representatives of the various States for approval; but there is no evidence that their terms were agreed to. If they were accepted, these drafts furnish a most striking instance of an acknowledgment by foreign Powers of the sovereignty of the Crown of England over the sea. If they were not accepted, they are of value only as showing the position taken by Edward I. Unfortunately the record of the proceedings before the commissioners is very meagre, and no trace of any award has been found. In all probability the matter was allowed to drop or, as Selden suggests,[3] was settled by agreement. Notwithstanding the weakness of any argument for the recognition of England's sovereignty founded on these drafts, almost all writers on the English side rely strongly on them, and conveniently shut their eyes to the obvious objections which can be made to them.

[1] Boroughs, *op. cit.*, p. 56. [2] Boroughs, *op. cit.*, p. 62.
[3] Selden, *Mare Clausum*, 1635, Lib. II. cap. 27.

Another important document in the Roll is entitled : *Articuli super quibus Justiciarii Domini nostri Regis sunt consulendi.* It is written in Latin and belongs to the reign of Edward III. By one of the articles the justiciars are required to advise as to the means to be adopted for reviving the forms of procedure ordained by Edward I for :—

" restoring and preserving the ancient sovereignty of the Sea of England and the authority of the Admiralty therein, by correcting the laws and statutes previously ordained by his predecessors, Kings of England, for the maintenance of peace and justice among all people of what nation soever who may pass through the Sea of England."

The article then proceeds to explain that the laws and statutes referred to were the Laws of Oleron, published by Richard I in the island of Oleron on his return from the Holy Land. This Writ of Consultation illustrates well the position of Edward III on the question of the sovereignty of the sea. He, like his grandfather, Edward I, does not assert his right as anything new, but claims that it was an old one, long inherent in the Crown of England, that it had been actively exercised by his predecessors, and dated at least as far back as the reign of Richard I.

It is interesting to note that this record contains the earliest statement of the origin of the Laws of Oleron. This is not, however, supported by any other evidence. Hallam [1] speaks of the connection of Richard I with these laws as " an idle story," but he does not appear to have been aware of its source, for he makes the mistake of saying that they were said to have been promulgated by Richard on his departure for, instead of on his return from, the Holy Land.

There is one other document, four copies of which are to be found in the *De Superioritate Maris* roll, which is frequently referred to by the seventeenth-century writers. It is an agreement between the masters and mariners of England, Bayonne and Flanders, requiring the vessels of these countries to carry the flag of their State and letters patent bearing the seal of their town of origin. Provision is also made for robbery and murder being tried according to the custom of the country where the trespass is committed. Endorsed on one of the copies is a memorandum to the effect that a similar agreement was entered into between the masters and mariners of England, Bayonne and Spain. Appended to each of the membranes is what appears

[1] Henry Hallam, *Europe during the Middle Ages* (1818), Chap. IX. Part II.

to be the decision of Edward III's justiciars as to the forms of procedure to be adopted in maritime causes in England. It requires the admirals and masters and mariners of the ships of war of the Cinque Ports and others to observe the forms of procedure which were laid down by Edward I, with such amendments as Edward III and his Council might ordain. The value of the document in relation to the controversy on the sovereignty of the sea really rests on one clause only, in which, quoting the words of the Writ of Consultation, reference is made to the preserving of "the sovereignty which the ancestors of the King (Edward I) used to exercise in the said Sea of England as shown by the ancient declaration and interpretation of laws made by them to govern all manner of people passing through the said sea."

The remaining records in the roll do not bear directly on the question of the sovereignty of the sea, but there are a few other documents of the same period, still extant, which were relied on, as helping to establish the historical basis of the Stewart claim. In 1336 a commission[1] was granted by Edward III to Admiral Geoffrey de Say instructing him to proceed to sea and intercept certain French ships which, it was believed, were preparing to proceed to Scotland. The narrative of the commission, which is written in Latin, is in these terms :—

"Whereas we call to mind that our ancestors, Kings of England, have in time past been lords of the English Seas on every side, and defenders of the same against the incursions of their enemies, and it would deeply grieve us if our royal honour in this kind of defence should in our time (which God forbid) be lost or in any way diminished."

Here we have a very definite statement of Edward III's claim to the sovereignty of the sea, and one is not surprised to find it repeatedly quoted in the time of Charles I and the Commonwealth. It certainly shows the attitude of the later Plantagenet kings, but the *ipse dixit* of the king is hardly sufficient to establish his own claim, especially when its exercise affects members of foreign nations. Charles I was struck with the terms of this commission and, immediately after it had been brought to his notice by Boroughs' Latin memorandum in 1633, he adopted its words in the first Ship-money writ :—

"Forasmuch as We and our Progenitors, Kings of England, have been always heretofore masters of the aforesaid Sea, and it would be very irksome to us if that princely honour in our time be lost or in anything diminished."[2]

[1] *Rot. Scot.*, 10 Edw. III. m. 16.

[2] Rushworth's *Historical Collections* (1721 ed.), Vol. II. p. 257.

In this way he declared himself publicly as the Sovereign of the Sea; and in the proceedings against Hampden which followed, the king's sovereignty of the sea lies at the very centre of the case for the Crown.

Apart from the complaint in the Grimbald proceedings, the records which we have quoted are merely assertions by the English Crown of a right to which it made claim; but in a record of the reign of Edward II we have a remarkable admission made by foreigners that the sea, as far off as the coast of Brittany, was under English dominion. Certain Flemish merchants had been robbed at sea by English sailors; they made complaint to the king and called on him to redress the wrong they had suffered at the hands of his subjects. In the complaint they state that the depredations had occurred " on the Sea of England off Crauden." Lengthy negotiations followed, and ultimately in 1320 Edward II gave instructions to the Keeper of the Cinque Ports and others to make inquiry into the matter through their justiciars, and to punish the offenders. In these instructions [1] the words of the complaint are quoted, the depredations being stated to have taken place, *super mare Anglicanum, versus partes de Crauden, infra potestatem dicti domini nostri Regis*, and the jurisdiction of Edward II is expressed in these terms : *quod ipse est dominus dicti maris, et depraedatio praedicta facta fuit supra dictum mare infra potestatem suam.* The value of this admission depends on the situation of Crauden, which has now been identified as a small seaport on the coast of Brittany.[2] That being the case, we have here what is probably the solitary recorded instance of a direct admission by foreigners of the dominion of the king over the sea at a distance from the shores of England. The record is quoted by Boroughs in his Latin manuscript, but, for some unexplained reason, it is omitted from the English translation, and accordingly is not to be found in the printed edition of his book. Selden,[3] whose attention was probably called to it by Boroughs, refers to it, but he cannot have known that Crauden was in Brittany, or he would certainly have made full use of the argument such a fact supplies.

While it was chiefly to the records of the later Plantagenet period that the advocates of England's claim looked for the

[1] *Rot. Pat.*, 14 Edw. II. Part II. m. 26 *in dorso*.
[2] See Fulton, *The Sovereignty of the Sea* (1911), pp. 54–6.
[3] Selden, *op. cit.*, Lib. II. cap. 29.

historical warrant for their contention, there is one document of a considerably earlier date which came to have an importance exceeding all others. This was the famous ordinance of the second year of King John, requiring all vessels, foreign as well as English, " to strike and veile their Bonnets at the commandement of the Lievtenant of the King, or of the Admiral of the King or his Lievtenant." [1] The genuineness of this Ordinance has been disputed, but the weight of authority is in its favour. Although no contemporary copy is extant, it found its place in the *Black Book of the Admiralty*, where it is inserted in the handwriting of the reign of Henry V. In all probability the object of the ordinance was merely to provide for vessels being stopped by the king's ships to ascertain their character, a wise precaution in these days of piracy; but in course of time the original object of the ordinance was lost sight of and the lowering of the sail developed into a ceremony signifying a formal act of homage. It came to be regarded as the symbol and acknowledgment of the English claim to sovereignty of the sea, and was jealously guarded as such.

During the two centuries which followed the close of the Plantagenet dynasty, the *De Superioritate Maris* roll and the other records to which we have referred were forgotten, and scarcely a trace of the old claim to the dominion of the sea is to be found. It is true that in the Lancaster and York periods *Custodes Maris* were appointed to guard the sea, that " wafters " were sent out to protect fishing vessels against pirates, that " Protections " against civil suits were granted to those engaged *super salva custodia et defensione maris*, and that safe-conducts were issued to vessels both going from and coming to England. Such facts as these, however (although they were, at a later date, used as arguments for England's sovereignty), do not afford any evidence of a jurisdiction at sea differing from that exercised by other countries. Nor did the Tudor kings revive the claim, although they occasionally insisted on the salute. They sought rather to encourage foreigners to trade with England, and even invited them to fish off her shores; and the claim to the exclusive right to the fishing in the North Sea, which was revived in the seventeenth century, was never dreamt of. The policy of Elizabeth's reign, directed as it was largely against the Portu-

[1] See Borough's translation of the Ordinance, *op. cit.*, p. 71. The French version is given by Fulton, *op. cit.*, p. 40. He discusses fully the question of its authenticity.

guese and Spanish pretensions to the sole right of navigation in the East and West Indian Seas, was hostile to maritime sovereignty, and it is to her Ministers that we owe one of the most comprehensive statements of the principle of the freedom of the sea, far in advance of the accepted view of her time. In the answer to a complaint by Spain that English vessels were violating the Spanish sovereignty in the West Indian Seas, they state:

"The use of the Sea and Ayre is common to all. Neither can any title to the Ocean belong to any people or private man, for as much as neither nature nor regard for the publicke use permitteth any possession thereof."[1]

Such a statement could never have been made had there been, at that time, any serious pretension on the part of England to sovereignty over the English seas. Selden, who had a wonderful faculty of seeing any weakness in his own case, and always seeks to anticipate any hostile argument, admits the awkwardness of this statement, but points out that it arose from a too slavish adherence to the maxims of the Civil Law, and was clearly contrary to the law of England as well as to the Law of Nations.[2] It was not till the English fishing industry, already decaying, was in danger of being entirely wiped out by the activities of the Dutch fishermen, that the Stewart kings revived the old Plantagenet claim, and presented it in a form much more extravagant than it had assumed in the time of Edward III.

On such documents as those which we have referred to, Charles I and the Commonwealth sought to establish the right of England to dominion over the North Sea and the English Channel. These records are adduced as convincing proofs of the reality and ancient character of the sovereignty. While they form a very slender foundation for the extensive claim made in the seventeenth century, it is clear that Edward III aimed at maritime dominion, and was ambitious to be known as *Dominus Maris Anglicani circumquaque*. This did not involve mere naval pre-eminence, although that was established, temporarily, at least, by the Battle of Sluys, but actual sovereignty, a right which he asserted belonged to him, as it had belonged to his predecessors, kings of England, "by reason of the said kingdom."

Light is thrown on the nature of the Plantagenet claim

[1] Camden, *Annals of Queen Elizabeth*, 1635 ed., p. 225.
[2] Selden, *op. cit.*, Lib. II. cap. 24.

by the words used to describe it. It is called *Superioritas* or *Dominium*, both words used to designate the right of a feudal superior, and was analogous to the feudal superiority which the kings of England had within the land of their kingdom. In the complaint in the Grimbald case quoted above, the right of the Crown is described in detail, and consists of the familiar rights and duties of a feudal superior, involving the duty of preserving the peace and punishing its breach. Like the sovereignty of Venice over the Adriatic, it arose from the necessity of suppressing the piracy which abounded. We do not, however, find in these old records any hint that the kings of England looked on the sea itself as part of their patrimony, or that they considered themselves entitled to exclude foreigners from passing through it, or from appropriating its produce. The Plantagenets strove for little more than a high-sounding title, and were willing, for the prestige which it conferred, to undertake the burdens and duties which it involved. The Stewarts, on the other hand, were more practical. They saw a great source of wealth being taken from them by the energy of the Dutch fishermen, and they revived and amplified an antiquated claim as a pretext for destroying the industry which their rivals had built up. The one claim had its origin in the suppression of piracy, the other in commercial rivalry; the one sprang from the personal ambition of two exceptionally able monarchs, the other from intense national jealousy of the success of active and industrious competitors.

The English pretension was indeed an extravagant one. It amounted to an assertion that the whole of the North Sea and English Channel was as completely under the dominion of the king as the territory of England itself. "Monstrous," to use the epithet applied to it by Mr. Gardiner, as such a pretension was, it is what we find definitely claimed in numerous books, pamphlets and State papers of the time of the Stewarts and the Commonwealth, and it was fervidly supported by the mass of the people. By the time of James II, however, there were thoughtful people who had come to question the genuineness of the claim, or, at all events, the wisdom of insisting on it. John Evelyn, who had written strongly in its support,[1] makes, in a letter to his friend Samuel Pepys, dated September 19, 1682, one of the most remarkable recantations in literature.[2] He tells him

[1] John Evelyn, *Navigation and Commerce, Their Origin and Progress*, 1674.

[2] The letter is included in the Appendix to most editions of Evelyn's *Diary*.

that his book was written on the instructions of others, and that he never believed in the case for which he had so ably argued. It is not, however, till after the revolution of 1688 that we find any Englishman bold enough publicly to dispute the claim. Sir Philip Meadows, at one time Cromwell's Latin secretary in succession to Milton, saw the danger of insisting on it. His book entitled *Observations Concerning the Dominion and Sovereignty of the Seas* was written in the reign of James II, and met with the king's approval; but it was not published till 1689. Although little known, it is a statesmanlike production. In it he shows the mischievous nature of the pretension. It is, he says, bound to irritate foreign Powers, and might at any time force England into war, as it had already so often done. It leads only to a dilemma. If the claim is successfully maintained, this can only be at the cost of endless and dangerous quarrels; if it is not, the honour of England is prostituted. Concerning the Dominion of the Sea, he says, there are many traditional and popular errors current, of most dangerous tendency, and these he seeks to refute. The sea, he argues, may have been *claimed* by the kings of England, but it was never *occupied*. The much-vaunted homage to the flag is merely *symbolum pacis et amicitiae*, " a symbolical expression of peace and goodwill." And what of the *De Superioritate Maris* roll? When he comes to deal with it he says: " At first reading it seemed to me at some distance a stone wall athwart my way, and no possibility of passing further," but a more careful examination showed him (as it must have shown every one else who was not blinded by national prejudices) that it was " but a silken curtain of specious words drawn artificially before the eye, and easy to be put back by the hand."

PROTECTORATES AND MANDATES

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It will be found on examination that the conception of a Protectorate has vitally altered its character within our own memory. In its origin, Protection was little or nothing more than a form of guarantee. It did not necessarily affect in any degree the sovereignty of the protected Power. The relations between the protecting and protected States sounded in contract only: all that was involved in the relationship was a promise of protection in return for a *quid pro quo*[1]—notably, a certain accommodation to the wishes of the protector in matters of policy.[2] Of this type were the treaties of protection entered into in the fourteenth and fifteenth centuries by Genoa with the French and Spaniards; Monaco with Florence, Savoy, Milan, France[3] and Austria; San Marino with Urbino and the Sovereign Pontiff; Venice with Byzantium; Ragusa[4] with Venice and Hungary; Andorra with France and the Bishop of Urgel; Danzig[5] with Poland.[6]

The sovereignty of the protected nation remained unaffected.

[1] The relation of superior and vassal in feudal times was different. The ceremony of homage, like that of marriage, went beyond the sphere of contract, and created a *mi-souverain* State, shorn of some of the fulness of sovereignty. Among the scanty modern literature of the subject in English, the article by Dr. C. Stubbs, in *Law Magazine and Review* (1882), p. 279, should be specially consulted.

[2] Protection may be tacit: thus the relationship of Russia to Bulgaria, between 1878 and 1885, can hardly be described as anything but Russian protection of Bulgaria, subject to Bulgarian subservience to Russia. The nominal suzerainty of Turkey complicates, but does not essentially alter, the situation.

[3] Monaco has since the war again become a French client-state.

[4] By Art. 4 of the Treaty between Russia and France, signed at Paris, July 8, 1806, Ragusa was recognised as "independent, as in the past, under the guarantee of the Porte." The independence of the Ionian Islands was recognised (Art. 5) without qualification.

[5] By the Treaty of Tilsit (1807) Danzig passed under the joint protection of Prussia and Saxony (the King of Saxony being Grand Duke of Poland), subject to the free navigation of the Vistula.

[6] In spite of Engelhardt's opinion to the contrary, it would seem that Vattel is right in observing that such protection involves no diminution of sovereignty, *Droit des Gens*, Vol. I. c. I. §§ 4, 5, 6.

It retained its control of its own foreign relations, and it was free to break its engagements if it pleased, at the risk of no penalties beyond those of war and retortion. Its rulers and people owed no allegiance to the protecting Power, and could not be treated as guilty of treason to the latter. It remained a full member of the Society of Nations.

It might have been thought that, as time went on, it would have become increasingly evident that no State could safely be responsible for the guarantee of another, over whose conduct it exercised no control: that it would have become usual for the protecting State to interfere in the conduct of affairs by the protected State, and that at all events the frequent stipulation would have been made that the conduct of its foreign affairs by the protected State should altogether pass to the protector. In point of fact, although we find that interference with domestic affairs, particularly in the matter of imposing garrisons, seems to have supervened in the case of Genoa and Monaco, when "protected" by the successors of Charles V, there are very few cases indeed in which the control of foreign affairs was expressly resigned. When Danzig accepted in 1454 the protection of Poland, she carefully retained it.[1] Even under the dictatorial protection exercised over Genoa by Louis XII of France, Genoese ambassadors were sent to Rome, the focus of European intrigue and statecraft. S. Marino still in 1896 maintained a legation and five consulates in France. In point of fact, the effective right of legation is almost essential to a State's continued existence, and more than ordinarily essential to a protected State's existence.[2] A stipulation placing all its foreign affairs in the hands of its protector is regarded by most authorities as depriving the protected State of its international character, and as reducing it to a mere possession of the protecting Power.[3] Such fragment of domestic self-determination as remains to it is thenceforward a mere matter of constitutional law, dependent on the goodwill of the protector. Perhaps this is to go a little too far: it is just conceivable that a State cut off from the society of its sister States

[1] Engelhardt, *Protectorats* (1896), p. 160.

[2] Thus Vattel says (*op. cit.*, § 5): "Pourvu que l'Allié inférieur se réserve la Souveraineté, ou le droit de se gouverner par lui-même, il doit être regardé comme un Etat indépendant *qui commerce avec les autres* sous l'autorité du Droit des Gens." Of course the italicised words are descriptive, and must not be pressed; but they show how naturally and closely sovereignty and intercourse are allied.

[3] Vattel, *op cit.*, § 11.

might yet be the subject of their affectionate regard. But essentially, as a matter of practical politics, the independence and consideration of a State depend upon its intercourse with others. If it is treated in an oppressive or degrading fashion, other States must instinctively feel themselves threatened, and experience a feeling of repulsion and revolt. This requires that they should feel the oppressed State to be one of their circle—and this necessary feeling can hardly exist in the case of a State so markedly cut off from all official intercourse with them.

The loss of control over foreign affairs is therefore an almost conclusive criterion of the loss of existence as an international personality. The increasing desire on the part of protecting Powers to insure themselves by assuring the control of the foreign intercourse of their *protégés* led to the virtual disappearance of the Protected State. The wars of the French Revolution, demonstrating the extent to which a "protecting" Power was able to control the policy and resources of the "protected" States,[1] discredited the whole institution.[2] The so-called United States of the Ionian Islands, placed in 1815 under British protection, were virtually placed also under British control.[3] The old conception of a really independent, but protected, State had disappeared. The British King, personally or by his High Commissioner, convoked, prorogued and dissolved the Ionian parliament. The British King appointed its president and chief clerk, and had a veto on the election of senators. He exercised a veto on legislation. Town Councils could only pass such measures as His Majesty's agents approved. Most of the judicial officers were appointed by him. It is not unfair to say that in

[1] Such as the Batavian, Helvetic, Cisalpine, Etrurian, Parthenopean, Roman and Ligurian Republics, not to speak of the later Confederation of the Rhine.

[2] Cf. the history of Valais, "protected" by France, Helvetia and Cisalpina, in Engelhardt, *op. cit.*, p. 144.

[3] Their independence "and constitution" had been guaranteed by Russia and France in 1801 (Treaty of September 28). Russia well knew the opportunities for intervention afforded by guaranteeing a constitution. Her dealings with Poland all hinged on such an apparently innocent clause in the Treaty of 1772. The Treaty of Oct. 24, 1815, provided that the United States should be free and independent under the "immediate" and "exclusive" protection of the British King, managing their domestic affairs with the approval of the protecting Power, who promised "'une sollicitude particulière' to its legislation and administration" and to "diriger les opérations" of constitution-making, subject to their admitting a British garrison and putting their troops under British orders (Arts. 1–7), flying the British flag above their own, and accepting British jurisdiction in their ports in military and ceremonial matters.

these circumstances the independence of the Seven Islands was reduced to *nil.*

The institution of this Republic of the Ionian Islands with a nationality supposed to be different from that of Britain, and with a population not technically subjected to the English law of treason, was the parent of a series of protectorates of a new type. Europe was coming into official and formal contact with Africa and Asia: that is, with peoples whose civilisation is very different from that of Europe. These peoples could neither be ignored as States nor treated quite on the footing of ordinary States. The formula which was found convenient to express the relations between them and the States which desired to exploit their resources was that of Protection. And this meant protection in the new sense: not protection under contract—a mere matter of bargain between independent Powers—but protection involving a certain measure of control, and a definite diminution (if not a total deprivation) of sovereignty. It in all cases involved the declension of the protected State to the level of a *mi-souverain* State; and in many cases it involved the loss of control over foreign relations and the almost inevitable disappearance of the protected Power from the list of States known to international law.

Of this kind of Oriental arrangement, the States of Khiva, Zanzibar, Madagascar, Tonquin, Tunis, may be cited as examples. They tended constantly to absorption in the body of the protecting State. Sometimes this result was candidly accomplished by open annexation, as with Madagascar and Corea. Sometimes it was implicitly accomplished by the mere operation of time. It is impossible to maintain that the Malay States are in any sense independent, when we know that they are administered in every detail by agents of the British Crown. The insensate fiction is still kept up that their people are not British subjects; but this can only avail for domestic and constitutional purposes. Internationally, where the authority of the Crown prevails, the Crown is Sovereign,[1] and it cannot be doubted that internationally these communities have been absorbed into the British Dominions. The British Parliament actually legislates in terms for "protectorates," for which, if the theory of their foreign character is correct, it has no more right to legislate than for France.[2]

[1] Cf. *Law Magazine and Review*, May, 1912, p. 334, and August, 1912, p. 470.

[2] See *e. g.* the Maritime Conventions Act, 1911 (2 and 3 Geo. V., c. 57).

The reason which underlay this adoption of the relation of protection was partly the desire to conciliate the susceptibilities of the "protected" population and rulers, by purporting to protect them rather than to control them. But in some cases it was entirely due to an unwillingness to confer on them the rights and status of subjects of the protecting Power. "It would be extremely inconvenient," thought Governor Jervois of Singapore, "that these people (the Pêrák Malays) should become entitled to the rights and privileges of British subjects."[1] In this case, Pêrák to all intents and purposes lost its international character immediately on the conclusion of the Treaty of Protection in 1874. The same so-called "protection," which meant "government," [2] was extended subsequently to the other Malay States, with the possible exception of Johore, which still seems to enjoy—or until lately to have enjoyed—some fragment of native autonomy, even in federation with the rest.

Up to this point, the word "protectorate" had been little in use. The relation had ostensibly been one of contract between two independent Powers, not necessarily involving any loss of sovereignty, and leaving it open to either party to break the engagement without incurring the penalties of treason, or anything beyond the censure which attaches to disregard of engagements. In cases where it did involve a diminution of sovereignty, that diminution was not such as to make it reasonable to apply a new word like "protectorate" to the protected Power. The protected Power was a State, if an abnormal State.

But these States of an alien civilisation were not really treated as States at all. Considered such for purposes of constitutional fiction, they were practically regarded as colonies. Yet they could not be called colonies—so we called them "protectorates." [3]

[1] See *Law Magazine and Review*, May 1901 and August 1901, "Debt-Slavery in Malaya."

[2] It is not without significance that in the Treaty of Sèvres the British protectorate is said to be, not "of" Egypt, but "over" Egypt.

[3] "Le néologisme de *protectorats*" (Engelhardt, *op. cit.*, p. 5). The word seems previously to have been employed in the quite different sense of the protection extended to certain subjects of one State (Turkey) by another (Russia). In fact, it admits of two different senses. It is sometimes employed to denote the fact of protection, and sometimes to denote the territory or area "protected." In the former sense it was used in the middle of the nineteenth century to denote the protection exercised by Russia over subjects of the Porte, and as early as 1806 by Napoleon, to describe his attitude towards the Confederation of the Rhine ("En acceptant le protectorat, nous avons contracté le double obligation de garantir les territoires de la confédération . . ." September 1806, letter *apud* Engelhardt, *op. cit.*, p. 155). In the latter sense it is only used when protection means control.

Virtually colonies; constitutionally foreign soil—that is the definition of "protectorates": juridical monsters.

And in this form the denaturalised conception of "protection" lent itself very well to a further step. This was to afford a formula for dealing with the tribes of Africa who enjoyed, not a different civilisation, but no civilisation. Their chiefs entered into treaties of "protection," which not only amounted to the resignation of all independent status, but are universally recognised as such. Not being organised, as were the Indian and Malay States, those tribal communities do not lend themselves to the simple process of British government through the control of native despots. The "protected State," in fact, is not a State at all. And thus, in these cases, it is the neologism alone that is used; we speak only of "protectorates," and never of "protected States." Not only virtually, but actually, European Powers have annexed those territories, while shrinking from the consequences of that incorporation, and asserting that they are protecting States where there are obviously no States to protect. Either an African protectorate means nothing, or it means annexation.

The people of a territory candidly annexed have the protection of British Law. The people of a really sovereign or *mi-souverain* State, especially if enjoying foreign relations, have the protection of international law and of that sentiment of apprehension which all sister States really do feel when one of their number is insulted. But the rulers and people of India, of Malaya, of Tunis, have neither the rights of citizens nor the inviolability of aliens. The highest rulers of Baroda and Manipur have been subjected to trial and penalties prescribed by no law but the arbitrary will of the prosecutor. This cannot be considered a satisfactory state of affairs.

We have therefore, in the history of Protection, some four stages:—

1. *The Mediæval conception of Suzerain and Vassal:* involving a certain, but definite, impairment of sovereignty on the part of the latter, and setting up "real" rights residing in the former. "Protection" was the specific term by which one important duty of the suzerain was known.

2. *The Renaissance conception of Protection* as a relation of pure contract, a promise of protection in return for solid advantages, implying no interference with domestic affairs (except

so far as the admission of a garrison might be concerned), conferring in principle no right *in rem*, and leaving the protected State free to have relations with foreign Powers.

3. *The denaturalised conception of a protected State* as a State deprived of foreign relations, cut off from the interest of the sister nations, and almost necessarily incorporated (internationally speaking) in the protecting State. Styled in this extreme a "protectorate"; definitely marking its failure to attain State rank.

4. *The application of the word Protectorate* to territories which are not States, but in which it is desired to establish the same combination of control with repudiation of annexation as is attempted to be set up in 3.

The latest instance of the proclamation of a protectorate is the British protectorate of Egypt. This was announced early in the recent war (December 18, 1914), and, of course, required success to give it effect as regards other nations, for the status of a territory cannot be altered by military occupation or by conquest, so long as the enemy has an army in the field. Germany could not legitimately have annexed Belgium, or the occupied Belgian provinces, during the currency of the war. If she could, then she might have forced the Belgian populations into her armies. Frederic II did this with the Saxons; but even in his day it was reprobated, and it has now definitely become illegal. This was tacitly recognised in the Treaty of Sèvres, which (Art. 101) provided for the *ex post facto* validation of the act.

It is usual to couple with what we must now describe as "protectorates," the so-called "spheres of influence." These are tracts of uncivilised land, under control by no Power, but which, by agreement, certain Powers have bound themselves to abstain from controlling, in favour of some one Power. The only important thing to notice about them is that such agreements cannot bind third parties.

We now come to the consideration of the novel institution of Mandates. Their germ cannot be found (as is sometimes imagined) in the Treaty of Berlin, 1878 (Art. 25), which conferred upon Austria the right, and probably imposed on her the duty, to occupy and administer Bosnia and Herzegovina. The provision was concurred in by all the signatories, including the Ottoman Porte; but it is clear that it amounted to an annexation. In effect, what does an annexing Power do, beyond

occupying and administering?[1] Let us recognise that international law puts facts before phrases. Austria simply administered the territory like a conqueror, and the difference was internationally negligible (though *constitutionally* important) when, thirty years later, she openly annexed it. The status of the inhabitants, meanwhile, was excessively ambiguous. The jurisdiction of the consular courts of foreign Powers was equally so. No account was given or asked for of the progress and results of the Austrian administration. No responsibility was laid upon the Powers by Turkey to supervise or check it.

So far as can be seen, the institution of mandate now assumes for the first time a place in international affairs.

In its nature, the mandate is, of course, derived from the *mandatum* of the Roman Law. This institution may be described as Agency with an infusion of Trust. The principal is the *mandans* and the agent the *mandatarius;* so that the proper substantive to employ in speaking of the latter is "the mandatary"—not (as commonly) "the mandatory." (In Scotland, the term mandatary is well known; "to sist a mandatary" is the legal term for the appointment of a representative subject to the jurisdiction of the court by a foreign litigant.) Probably the principles of the Law of Justinian would generally be held, *mutatis mutandis*, to apply to the case of the international mandates created by the Covenant of the League of Nations. It is a little difficult, however, to seize the precise idea intended. The League is intended to be the Principal—but the League is not a corporate body, and it is not very clear how a *mandans* composed of the forty-odd members of the League will function. The League looks like a corporate body; but it will hardly be denied that its true resemblance is to a voluntary association. Now a partnership of forty-two is not a workable concern, and one may have some doubts as to how the League will work as a principal. Although full provision is made for the presentation by the mandatary of reports and accounts, it seems, with the experience of Turkey before us, difficult to see how there can in practice be any real check on the administration which the mandatary establishes, provided that it is not patently revolting. Indeed, the position of Turkey towards her subject races has, since 1856, been very much that of the mandatary of Europe.

There are, as we know, three types of mandate under the

[1] That it may not have the *jus abutendi* is scarcely a solid argument.

League. The first is the type which leaves the territory autonomous, but subject to the "administrative advice and assistance of the mandatary." Foreign relations do not seem to be interdicted to such communities; and in theory they may be, what the Covenant calls them, "independent nations." In fact, it may be doubted whether the advice and assistance will not prove to resemble the sort of advice which the British residents soon convinced the Malay Sultans that they had undertaken to receive —"advice" namely, "which must be taken." By § 94 of the Treaty of Sèvres, Syria and Mesopotamia are to be under mandates of this type.

The second type is that which invests the mandatary with full powers of administration, under certain conditions. Nothing is said about legislation; but it may be assumed that this is included in "administration." Central Africa is the happy hunting-ground of this class of mandatary. And it is specially stipulated that the mandatary is to be under conditions which will guarantee freedom of conscience and religion (subject only to the maintenance of public order and morals), the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications, or military and naval bases, and of military training of the natives (for other than police purposes and the defence of territory)—and will also secure equal opportunities for the trade and commerce of other members of the League.

It is exceedingly difficult to see in what respect such a state of affairs differs from annexation. If the entire administration of a territory is committed to you, you have entire control there. Let us imagine the case of a revolt. The territory is not sovereign, or even *mi-souverain :* there is nothing to prevent the infliction by the mandatary of the penalties of treason on the people under its control. By Article 257 of the Versailles Treaty, the territory is to be "transferred to" that Power—so that it has a clear legal right to consider itself as entitled to their allegiance; though it is not so clear who is to make the transfer.[1]

Both varieties of mandate-territory, the second as well as the third (so far as German possessions are concerned), are thus to be "transferred to" the mandatary Power (Versailles Treaty,

[1] Hardly Germany, for she has renounced her rights; hardly the League of Nations or its Council, for they are not invested with them, even if capable of being so; hardly the Principal Allied Powers, for the territory is to be transferred to the mandatary "*en même temps*" with the German property and possessions therein.

Art. 257). If territory is transferred to you, no labelling of it with the word "protectorate" will prevent it from being your territory.

It is difficult, indeed, to see how this second class of mandate substantially differs from the third, in which the mandate territory is candidly regarded as incorporated with the territory of the mandatary. No doubt it is desired, in dealing with the second class, to avoid incorporation—but it seems very hard to see how this is possible. Absence of incorporation involves, among others, two consequences of capital moment: the population is deprived of the rights of subjects, as we have seen; and the territory remains foreign from a fiscal point of view. Now in both these cases, and especially in the latter, foreign countries are interested. I do not think a government could be heard to say that a certain territory was "foreign" over which it had general powers of administration. This would be to juggle with words. There is no provision that the mandatary shall derive no advantage, and make no profit, from its trust; and even if there were, it is the substantial fact of control which has always been accepted as identifying territory with a particular State.

If one State were to undertake to administer a given territory for another, exercising the full powers of government there, and maintaining order by the strong hand, how could it be regarded as other than a cession?[1] It is surely time that publicists should grapple with realities, and refuse to be satisfied with phrases. Certainly the Powers which have agreed to set up an anomalous situation will be bound by their agreement; but their agreements will be interpreted with an eye to avoiding inconsistencies and anomalies; and non-signatory Powers will not be bound by them at all. In short, a country which exercises complete control over another cannot claim to have it recognised as independent, however much it may wish to have it so. A door must be open or shut.

It is thus, in my view, impossible to see any real difference in status between the territories controlled under the second type of mandate and the territories incorporated under the third.

[1] Lord Beaconsfield's biographer speaks of "the surrender of Cyprus" to Great Britain by the Cyprus Convention, which provided for its administration and occupation by that country, subject to the payment of an annual tribute (*Life and Letters*, Vol. VI. p. 302). It is difficult to discriminate surrender from cession. It seems to me impossible to argue that the "annexation" proclaimed in 1914 made any difference.

The difference may be justified from the point of view of the mandatary's duties, a wider discretion being given to its activities in the execution of the mandates of the third type.

It may be urged, in opposition to this view, that the mandatary is a simple agent, who is nothing but a tool in the hand and a mask on the face of the real sovereign—the States composing the League of Nations. This would be to ignore the facts of history, and to press the analogy of private-law agency to the verge of the ridiculous. The practical control to be exercised in unanimity by the nations which compose the League is so remote a thing that it is impossible to compare it with the ever-present control exercised over a business agent. Besides, this is not a business matter. A business agent can be called to account in pounds, shillings and pence. But if A gives B an irrevocable mandate to bring up his child, the practical result is adoption. It is the fact and the processes of administration, not its ultimate ends or its pecuniary profits, that are important in identifying a territory with a State. The tenant of a minor's or a lunatic's farm looks to the trustee or the agent for favour as the controlling power—not to the boy or the lunatic for whose benefit the estate is being managed.

It is tolerably obvious that Article 22 of the Covenant, relating to mandates, was drafted with a high regard for Mr. Wilson's supposed announcement that he "did not want a lawyer's treaty." Nothing less like a legal instrument than this section can be imagined. It reads like a University Extension lecture. There is, however, a difference between legal pedantry and ordinary precision. In avoiding the former, the article has drifted many miles away from the latter. Its language regarding the conditions to be fulfilled by mandataries is so slip-shod that it has given a loophole for the assertion of a right to close the "Open Door" in the third class of mandate-territory.

This assertion has caused great and legitimate astonishment in Japan.[1] That a war waged to establish international fraternity and equality should end in the creation of more close preserves was not what the Japanese expected. That a settlement of which conspicuous features were the opening up of waterways to international traffic, and even the opening up of land routes

[1] The "C" Mandates have now been issued and have come into force. The terms have been published. It should be noted that Japan is represented on the Council of the League of Nations and concurred in the action taken.—Editorial Committee.

to international use, not to speak of the standardisation of labour conditions, should comprise the exclusion of international trade from conquered territories, seemed to them contrary to the whole nature and purpose of the negotiations. Therefore, when it is laid down in Article 22 that certain territories committed to mandataries of the third or incorporating type "can be best administered under the laws of the Mandatary as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population," Japan naturally concluded that these meant all the safeguards introduced with regard to the mandates of the second or "control" type.

These, we have seen, provided for :—

(1) Freedom of conscience and religion.

(2) Prohibition of abuses "such as the slave-trade, the arms traffic and the liquor traffic."

(3) Prevention of militarism.

(4) Freedom of trade.

It is now urged that the words "in the interest of the indigenous population" are a discriminative and not a merely descriptive clause; and that freedom of trade, not being (according to this argument) "in the interest of the indigenous population," is not imposed on the mandatary.

It is a merely specious contention; and all reason is against it. The words are: "subject to the conditions above mentioned in the interest of the indigenous population." "*The* conditions above mentioned"—the words are quite general. Not a word is said implying the exclusion of any of them. Had that been intended, the phrase would have run: "subject to those of the conditions above mentioned which are imposed in the interest of the indigenous population," or "in so far as they are imposed in the interest of the indigenous population."

Even so, it is highly improbable that the exclusion of freedom of trade, if intended, would have been set up by the use of loose and general words such as these. Freedom of trade is a most important thing. If meant to be excluded, and alone excluded, from the category of "conditions above mentioned," it would certainly have been expressly excluded. It is as important, in the interests of the indigenous population, that they should not be subjected to the trade monopoly of the mandatary, as that the purposes of their military training should be limited

to defence — in fact, it is practically a very great deal more important.

The sole argument of those who maintain the opposite view is that it would give the words " in the interest of the indigenous population " no meaning, if they were not taken to imply that some of the conditions were excluded. But descriptive and literary surplusage is the very hall-mark of this section. It is an argument of exceeding tenuity in face of the obvious addiction of the draftsman to nicely rounded periods. Far more cogent as an argument is the contrary consideration, that words clearly showing the phrase to be something more than mere description would certainly have been used, by lawyer and *littérateur* alike, if they had really meant to qualify the generality of their language.

It may be concluded therefore that the sense of the Article is that all the conditions mentioned with regard to the second type, provided, as they are (more or less), " in the interest of the indigenous population," are applicable to mandates of the third type. This is in accordance with grammar, and with the *camaraderie* which is the soul of the League of Nations, and is not inconsistent, but, on the other hand, thoroughly in conformity, with the style of the Article. If, however, the true intention was otherwise, and we are faced by the bewildering necessity of discriminating between what is and what is not " in the interest of the indigenous population," it is clear that free trade as between the League Powers, ensuring as it does the absence of a monopoly on the part of the mandatary, is thoroughly in that interest.

Japan feels strongly in this matter.[1] Her navy preserved the all-important communications by which the German efforts were countered and the Pacific Islands won. She sees herself now excluded on an attenuated legal quibble from these very islands, in a way which Germany never attempted. It really is not a good demonstration of the benefits of the era of mutual helpfulness which she supposed to have been inaugurated by the Covenant of the League of Nations. Perhaps there is something to be said, after all, for legal precision in a document intended to create legal relations.

[1] But see footnote on p. 119 *supra*.—Editorial Committee.

SOVEREIGNTY

By W. R. BISSCHOP, LL.D.

No conception has been a greater hindrance to the development of a commonwealth of nations than that of "sovereignty." Born in the sixteenth century under circumstances when absolutism in the person of the King was part of the political ideas of the time, it flourished while absolutism remained part of the political creed in national government. The advance of democracy caused the original conception no longer to harmonise with the new ideas which grew up around it. Yet the idea was maintained. It provided those in power with a shibboleth for use against the inroads made upon their authority by the encroaching demands of a people's will and popular representation; and as international intercourse developed, it could be used against any attempted interference with a national government's prerogatives. The original conception had run its course, but rather than abandon the familiar idea, new theories were found to make it fit in with the circumstances of the age. As might be expected from endeavours of this kind, none of them has so far been entirely successful, and the puzzling difficulty of finding a new solution for an old problem has created a voluminous literature of great ingenuity. Sovereignty is the power finally to decide and dispose. The desire to wield that power is human, perhaps even more characteristic in the civil servant than in the despot. Whenever that power is wielded, sovereign rights are exercised, although it is unusual to associate the word "sovereign" with every exercise of such rights. The nomenclature is faulty, just as much as in styling the person "sovereign" who perhaps least of all human beings has the powers seemingly attached to his illustrious office. While the idea of sovereignty in municipal law is covered by the power finally to decide and dispose, it has in international law, in inter-State relations, assumed an additional meaning of aloofness as a direct result of the desire of independence which characterises all State activities in international affairs. Legally,

sovereignty—as the ultimate power of disposition—should be unlimited. In reality, absolutism alone in a small community can boast of undivided and unlimited sovereignty.

With the growth of the community and its developed organisation, men's activities become subdivided into groups, political, religious and economic, which, though subject to the State's sovereignty, demand, all and each of them in their sphere, part of those disposing powers to which ultimately they are, or may be, subjected themselves. As in mediæval times the King held the overlordship of his Barons, but these, in their turn, held in their domains similar powers of disposition, and to that extent limited the King's, so in more democratic days the groups may demand allegiance of their members similar to that asked by the State. The subdividing of activities may at one time have been ordained by the absolute ruler himself and, in so far as this led to the formation of groups with disposing power, it may be said that such powers as were exercised by them were derived from the absolute ruler and were part of his will. With the advance of democracy, however, the groups and their members gradually became more self-conscious, and demanded for themselves the exercise of their own will and a share of sovereign power so far as their sphere of activities was concerned.

Sovereignty of the State became limited, not only by the limits of the obedience of those who were ruled, but in its own bosom also by the will of its constituent parts. The limitations of sovereign power in any one State characterise the conditions of its political development. The greater the limitations, the more democratic the government. In addition, the intercourse between States caused limitations to grow up externally to the sovereign powers exercised by any one of them. Whilst, however, the internal limitations grew in an inverse ratio to the advance of democracy, the external limitations have always been religiously guarded against, and the antagonism against them increased as democratic tendencies advanced.

This may partly find its explanation in the far slower development of international intercourse, but also, and perhaps mainly, in the inability of the human race to abolish war and, in consequence, the greater fear of a State of losing its independence by sacrificing even a particle of its sovereignty. The main characteristic of that sovereignty was, and is still, the right and power to use the arbitrament of war in international disputes.

Yet the submission to arbitration and to a judicial tribunal is as much a prerogative of sovereignty as is the choice of war or the ordeal of battle for the settlement of disputes.

This may appear more clearly in another way. Whilst speaking of sovereignty and describing its characteristics (*e. g.* in a law-making body) as not being subjected to any superior power, and free to do and undo what seems best to itself, admission is made that even in the exercise of such sovereignty there are limits, external and internal. In other words, a sovereign power in our times is, in the exercise of its powers, neither unlimited nor uncontrolled nor independent. Its limitations are its own sphere of action. And as there are a multitude of spheres of action, various in importance, the word sovereignty should only be used relatively. If not so used, it seems meaningless. If Parliamentary powers are spoken of as sovereign powers, their outward limitation is " the instinct of subordination," as Dicey calls it, or the will of the people, as others put it. But the will of the people, if sovereign within the political boundaries of a nation, is limited by the majority of the electors. If we pursued the simile, it might be argued that the real political sovereignty lies in the dominating personality of the man who succeeds in persuading the majority of electors to vote as he thinks and wills. Thereby we should have returned to the veritable source of all sovereignty, the point from which we started, viz. the tyrannical powers of one absolute ruler in a community where contradiction is suppressed by fear.

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From the relative aspect of a State's sovereignty there are two deductions, one as to its external relations, another as to its internal constituent parts.

As to its external relations, it is incorrect to speak of international action as contradictory to the sovereignty of a State. Participation of a State in international co-operation is dictated by its own interest. As soon as in the national conviction a particular international arrangement is considered to come within the sphere of the nation's activities, that international arrangement becomes part of the activities displayed by the State within the external limits of its sovereignty. National conviction is here taken in the sense of *communis opinio* or *consensus*, or, less generally, the majority of the electors. If it be generally accepted within a nation that a certain international arrange-

ment is in the interest of the community, the acceptance and legalising of such arrangement by the legislator, and the submission to new—external—limitations is accomplished by virtue of the exercise of its sovereign will by the State. In its external or international relationship it has submitted to its own controlling power, in order to exercise its sovereign will for the recognition of the necessity to regularise what was without rule and regulation—a recognition which was equally understood and followed by the neighbouring States and sovereign Powers.

In that sense the entering into an international convention cannot be considered as derogatory of a nation's sovereignty. Such convention may limit the individual freedom of action of the States which entered into the contract; the decision to participate in, and the entry into, such convention remain acts of sovereignty, dictated solely by a State's own interest and the benefits which it may derive itself from the common action. The dictates of its own wish to progress, the suitability of the common purpose to its own interests and the benefits derived by itself from co-operation with others, are the sole considerations for, and act as a set-off against, the surrender by each individual State of its own freedom of action in the common interest. Decisions of this kind are not antagonistic to such sovereignty, for the gain of common action is too great; they are not contradictory to it, for they are exercised in consequence of such sovereign power. They are only exponents of its relative condition, which each new convention emphasises to a greater degree.

Even if international action were to go beyond co-operative measures, and were to create a new controlling or sovereign power, such action would only amount to the creation of a new sphere of activity which might act as a limitation of activities of the State who created it. If it were to curtail the individual sovereignty of any one State, it would curtail it in its aspect only of unregulated or barbaric absolutism. It need not, however, curtail it. It would certainly not do so by the creation of a judicial power or an arbitral tribunal, not even if submission to it of differences between States were compulsory, or if such differences were of a vital nature—that is to say, of a nature which is generally regarded as touching a State's sovereignty.

Compulsory arbitration or submission to an international tribunal could only be considered to constitute interference with

a State's sovereignty in so far as it would destroy its power of declaring war. If it were a prerogative of such sovereignty that it should choose its own mode of settlement of a dispute, it might be argued that the elimination of the choice of the arbitrament of war as the deciding factor in international disputes in favour of an arbitral award or a judicial decision would constitute a limitation of sovereign power. The limit would then be the elimination of choice between arbitration and war. As, however, arbitration is a method of comparatively modern growth, and previous to arbitration there was a choice only between war and submission, the advent of international arbitration should rather be considered as an extension than a limitation of the sovereign power of a State.

Such arguing would, however, be of a wrong kind and start from false premises. Arbitration, judicial decision, war, ordeal of battle are all modes of decision in a dispute, chosen and exercised by nations according to the lights of their day. Compulsory arbitration only means the exclusive choice of one of them and the voluntary abandonment of other modes of settling disputes.

Whatever method is ultimately chosen whereby the dispute will be settled, as long as each party to the dispute can adopt that method as a sovereign Power, its sovereignty remains unimpeached. The decision, whether reached by force of arms, by force of argument or by chance, remains without influence upon the sovereignty of a State. Its sovereign right was to submit to a method of reaching a decision, and the attainment of such a decision is the consequence only of the exercise of its sovereign right of submission. The obligation to submit is subsidiary to the will to submit, while an obligation to defend, if challenged, is no less a sovereign act when made in a court of law than it is when made on the field of battle. The outrage committed by Germany against Belgium in 1914 could, in any event, not have happened in a Court of Law, and though it was a violation of Belgium's sovereign power to choose whether it should go to war or not, it was certainly not a diminution thereof.

The controlling power which is needed in a State for the maintenance of administration and organisation seems unnecessary and out of place between States. It would create a sovereign power over the sovereign States, and the very idea thereof has been sufficient to wreck any attempt at solving the problem of

international arbitration and co-operation. It seems sufficient to place reliance upon the sovereignty of the individual States themselves as a warranty to exercise whatever control is needed in international intercourse and the carrying out and maintenance of whatever was provided or decided between them. It is argued that a judicial tribunal for international disputes would be impossible without the " sanction " behind the judicial throne to carry out its decisions. If the States are sufficiently democratised or civilised to acknowledge that the invocation of a judicial decision in international disputes is in harmony with the exercise of sovereign powers, the very existence of those sovereign powers in the parties who submit their difference to the decision of an impartial tribunal should guarantee the subsequent acceptance thereof and the carrying out of measures which are considered necessary in consequence of the solution pronounced by the international court.

If the carrying out of judgments and sentences be a prerogative of sovereignty, the recognition of judgments and sentences pronounced by other than national tribunals, to which a State has submitted, is as much a prerogative of that sovereign power, though unfortunately rarely admitted. In practice it has appeared that a number of arbitration awards have not been carried out or followed up by the nations who submitted their differences to such a solution. No doubt, as long as international relationship is not sufficiently developed, and the recognition of international agreement is not observed as a matter of course, there will be a breaking away from the rule of law and a refusal to listen to decisions and judgments which are antagonistic to national feelings. But does this warrant the imposition of an international police, of a war upon the recalcitrant judgment-debtor, of the creation of an arbitrary power to keep the unruly States in order?

It is hardly conceivable. Arbitral awards and judgments in international matters are observed in a number of cases, and are carried out by nations who have submitted to such arbitrations and judicial procedure. That is the main point. The greater the number of submissions, the greater the variety and importance of issues involved, the better will be the development of the arbitral and judicial procedure. The more judicious the decisions, the more popular this manner of solving international disputes will become. With the growth of their

popularity, the observance of their decisions will keep pace. The compelling force will be the national conscience and the will of the people. An international police, or whatever name or form might be adopted for a compulsory power, would mean warfare—" legalised " warfare, if you like—but nevertheless a deviation from right and reason for which there would be no other foundation than a psychological one.

As the psychology of a nation to a large extent rests on its character and traditions, its guidance and decision is largely a matter of statesmanship, and the success thereof mainly a matter of educational development.

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The other deduction of the relative aspect of sovereignty regards its internal constituent parts.

" Men do not belong to one all-inclusive group, the State, but to a variety of groups, and, in the last resort, they will follow the demands of their conscience." [1] The more organisation has rendered individuals conscious of their own strength, the greater limitation it has placed upon the sovereign power, or, in other words, the larger the sphere becomes of an individual's own power of disposition, the narrower will be the limits within which the sovereign power in the State can be exercised.

The trend of democracy is towards the diffusion of organisation, the sub-dividing of the power of disposition with a growing preponderance of the majority of voters, subject, however, to the preponderance of the individualistic will, which may prove in the end to be the real dictator and disposing power. In that atmosphere is born the idea of self-determination, which really means the power to dispose for oneself and to decide questions which are usually reserved in the last instance to the sovereign power in the State. As self-determination rests upon the decision of a majority, it forms part of the area of continuous friction between organisations in the community and the community itself, and the admission of such determination by a separate group will depend upon the power whereby it can make its demands felt. The recognition of the self-determining power of single groups as part of the constitutional law of a State would be the ultimate dissolution of the sovereign power of the State. Power of disposition in groups remains subject to the sovereignty

[1] Harold J. Laski, *Studies in the Problems of Sovereignty* (1917, New Haven, Yale University Press; London, Humphrey Milford), p. 263

of the State. Self-determination is the breaking away from that sovereign power of the State, the exercise by a group of sovereign power of its own.

As far as questions regarding self-determination remain within the boundaries of municipal law, their investigation need not further be pursued. Of greater interest at present is the query: when, if at all, do such questions cease to be municipal law only, and when, if at all, do they affect international relationship between States?

Is self-determination to be withheld from a group as against the State of which it forms a part? It is argued that "the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is, exclusively, an attribute of the sovereignty of every State which is definitely constituted," but that, in case of *de facto* situations, that is to say, in the case of the "formation, transformation and dismemberment of States," the "principle of self-determination of peoples may be called into play," and that "the principle recognising the rights of peoples to determine their political fate may be applied in various ways."[1] This seems to be playing with words. Why should there be a "right" of "peoples" to determine their political fate themselves and this "right" be denied to groups, however powerful, in States which are considered sovereign Powers? At the utmost it is a question of degree, but where does a "right" of self-determination begin, what is its basis, and who is to judge?

The creation of a *de facto* situation depends upon the strength and power of the group seeking to determine its own fate. A "right" so to determine its own claim to sovereignty would in such case depend upon its success, its power to do so, arms in hand. The recognition, however, of a *de facto* situation, does not establish nor recognise a "right" to create such *de facto* situation. It means only accepting it and acquiescing in it. A "right" of self-determination would mean *inter alia* a "right" of creating a *de facto* situation, and if such right do exist, it exists independently of its successful issue. To say that the grant or refusal of such right is "exclusively an attribute of the sovereignty of every State," means replacing that sovereignty in its shrine of absolutism from which the evolution

[1] "La question des Îles d'Aland," Rapport de la Commission de Juristes (*Journal Officiel de la Société des Nations*, Supplément spécial, Octobre 1920, pp. 5 and 6).

of the nineteenth century has displaced it. It is harking back to the Austinian theory of the "sóvereign" power as the *fons et origo* of all political rights. To cope with a demand for or with an attempt at self-determination is an act of self-defence and of self-preservation on the part of a sovereign State. It does not determine the right or wrong of such a demand or attempt, and if there be such a "right," the sovereign State may suppress it, but does not thereby become a judge of its own case.

The sovereign State is always in a position to take the initiative. It may attempt to dispose of the destinies of groups within its borders, together with part of its territory, without consulting the individuals who form part of such a group and without obtaining their consent. Such disposition may be part of its sovereign power. As soon as the group object and insist on making their own choice, or on determining their own destiny, a similar controversy arises in which the groups are thrown on their defence. Though the reversion of the parties and the defensive attitude of the subordinate groups may create a claim on their part of greater moral force, the issue remains the same. It remains a challenge of the sovereignty of the State, based upon the group's own claim to a right of disposal of their own destinies where interests vital to themselves are concerned. Is that challenge to be part of international law?

Self-determination by the vote of a majority is as arbitrary as the disposition of the destinies of communities by third parties. Only, self-determination is based on the principle of decision by a majority of those who are directly concerned, and in the diffusion of State organisation there seems to be some prospect, in any event, that the basis of development will be founded on the direct popular vote of a group in some modernised form or other, rather than on the autocratic rule of those who are to exercise the sovereign powers of the State.

Will it form the basis for submission to international arbitration or to an international tribunal? In the struggle for self-determination the determining factor will be the self-interest of the individual who forms part of the group concerned and who will ultimately prevail in the majority. Whether that self-interest be guided by his conscience or by more material motives, in the end it may right itself in the submission to the power which ultimately disposes of the interest of the community as a whole, especially in view of the doctrine that an individual's

right to self-government must yield to the welfare of society as a whole. But if this be not so, if submission be not the ultimate result, will a right be conceded to such a group to invoke the decision of a tribunal and to obtain protection and recognition beyond the borders of the State to which it belongs?

It is argued that an attempt at recognition would involve a negation of the sovereignty of the State. No doubt any attempt at questioning such right must involve the recognition of its limitations, but as soon as the limitation of the sovereign power is granted, it is only a matter of degree whether and at what stage of the controversy a "right" of self-determination may be submitted to arbitration or to a decision by an international tribunal. This is specially evident in the case of disposition of part of its territory by one State to another, either as the result of an unsuccessful war, or of financial embarrassment, or of an international agreement affecting the destinies of national territory.

Sovereignty of a State involves the undisputed right and duty to maintain law and order: it does not involve an unlimited or undisputed right to grant or to refuse power of disposition to groups within its borders. The refusal may be a matter of self-preservation; it does not of itself exclude an appeal to a tribunal for a decision in the dispute. A judicial decision in favour of the group insisting on self-determination would be a recognition that the dispute has transgressed the ordinary limits of the sovereign powers of the State, and forms no longer a subject of its own constitutional law. The questions, however, remain: Who should submit to the judicial tribunal, and who should form such a tribunal? If the right of submission be inherent to sovereignty, should such submission be left entirely to the State, and depend solely on the will of the State? If not—if the group which relies upon self-determination should be able to challenge and substantiate its challenge—then under what circumstances should an appeal to a tribunal be admissible? Should it be left to the tribunal itself to decide whether the parties are serious or whether the demand for self-determination is a frivolous one which need not be taken into consideration but left to the State itself to deal with? In other words, should the procedure to be followed be similar to the procedure in a municipal Court of Justice, leaving it to any one to bring an action and to the judges

to decide whether the plaintiff has a cause of action or is frivolously wasting the time of the Court?

A single person who for some reason or other wants to change his allegiance is, generally speaking, free to follow his own inclinations. The same may be said of a family or of a group of persons. Did it rest there, no difficulty would arise. The persons affected would migrate, leaving all their immovable property behind. That may not be so in the case of a demand of self-determination. It may then be the wish of those who are bent upon the exercise of their own will to leave the State to which they belong, but keep all immovable property which they possess. That immovable property, however, forms part of the territory of the State, and if it were torn away from the State without the State's consent, its loss would be felt as derogatory to the State's sovereignty, for the loss of territory is more serious than the loss of citizens, who can follow their own will, and be replaced by others. In fact, in international cessions of territory, geographical features and economical advantages by way of frontiers, accessible harbours or navigation facilities, have usually carried greater, if not exclusive, weight, and the fate of the population has usually been taken as a matter of secondary importance, if it carried any weight at all.

Who should form the tribunal? In the present undeveloped condition of international intercourse it is difficult to expect a final answer to this all-important question. It may be that the newly created international Court of Justice, once it has been established and has gained for itself the confidence of the nations, will have delicate questions of this kind submitted to it. It may also be that with the growth of confidence in international justice the popular demand for judicial solutions of all difficulties arising between States shall carry with it submissions to judgment and arbitration of whatever differences may arise between groups belonging to one or various States.

Whatever the trend of civilisation may be, in this respect also the intercourse between nations must ultimately succeed in harmonising the ideas of sovereignty with the rules of common sense and the will of the people.

EXTERRITORIALITY IN CHINA AND THE QUESTION OF ITS ABOLITION

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In view of recent events in China, and in view also of the desirability of being able to appreciate the so-called Chinese Question intelligently, the time is opportune for a reconsideration of Exterritoriality in that Republic and the question of its abolition. On account of recent events, the subject is no longer entirely academic; from the point of view of the development of Chinese democracy, as well as that of healthy international intercourse, it is now a living one. China's refusal to grant exterritorial rights to new States desiring to enter into Treaty relations with her, and the consent of Germany, as well as other States, to be denied these rights, are some of the events which have brought the problem into the domain of practical politics.

(1) *Conventional Origin*

Exterritoriality in China is purely of conventional origin and, as such, has been in existence for eighty years. Although Russia, towards the end of the seventeenth century, was the first of the European Powers to enter into Treaty relations with China, yet no grant of exterritoriality was made to an alien Government until the middle of the nineteenth century. For example, Article 6 of the Russian Treaty of 1689 provides that :—

" if hereafter any of the subjects of either nationality pass the frontier for private and legitimate business, and while in the foreign territory commit crimes of violence to property and life, they are at once to be arrested and sent to the frontier of their own country and handed over to the chief local authority, who will inflict on them the death penalty as a punishment for their crimes. Crimes and excesses committed by private people on the frontier must not be made the cause of war and bloodshed by either side. When cases of this kind arise, they are to be reported by the officers on the side on which they occur to the Sovereigns of both Powers, for settlement by diplomatic negotiation in an amicable manner."

Nor, since its first grant in the 'forties of the last century, has the Chinese Government entirely divested itself of its jurisdiction over the nationals of all Treaty Powers within its domain, for it was only in 1895 that China conceded similar rights to Japan. Articles 8 and 13 of the Japanese Treaty of 1871 thus empowered the officials of each State to try the other's nationals for breaches of the peace. And even after the outbreak of hostilities between the two countries in 1894 the Chinese Government was successful in maintaining jurisdiction over two Japanese spies arrested in a foreign settlement; this was acquiesced in by the Tokyo Government on the ground that in similar circumstances Chinese in Japan would be dealt with by Japanese authorities.[1]

The British Treaty of 1843, signed a year after the Treaty of Nanking, terminating the so-called Opium War, contained the first explicit grant of exterritoriality by China. Similar concessions were later granted to eighteen other States, including Russia and Japan on the one hand, and Germany and Austria-Hungary on the other, and this policy was continued until the Great War in Europe awakened an international as well as national consciousness among one-fourth of the world's population.

The Japanese Treaty of 1909, however, provides an exception to the general rule. A considerable number of Koreans having settled on the agricultural lands on the Chinese side of the frontier, Article 4 lays down that they " shall submit to the laws of China and shall be amenable to the jurisdiction of the Chinese local officials," and that " all cases, whether civil or criminal, relating to such Korean subjects shall be heard and decided by the Chinese authorities in accordance with the laws of China, and in a just and equitable manner." A Japanese consular officer, or an official duly authorised by him, may freely attend the trial, and, in the hearing of important cases affecting the lives of persons, previous notice will be given to such consular officer. Whenever the latter finds that " a decision has been given in disregard of the law, he shall have the right to apply to the Chinese authorities for a new trial to be conducted by officials specially selected, in order to assure the justice of the decision."

[1] M. T. Z. Tyau, *The Legal Obligations arising out of Treaty Relations between China and other States* (1917), p. 37. On the subject of Exterritoriality in China, the following treatises may also be consulted: Francis T. Piggott, *Exterritoriality* (1907); Frank E. Hinckley, *American Consular Jurisdiction in the Orient* (1906); V. K. Wellington Koo, *The Status of Aliens in China* (1912); H. B. Morse, *Trade and Administration of China* (1913); W. W. Willoughby, *Foreign Rights and Interests in China* (1920. Baltimore: The Johns Hopkins Press).

(2) *Defects of the System*

Exterritoriality, being devised in the nature of a temporary makeshift, is not without defects. Elsewhere [1] the writer has discussed the limitations as well as the extent of exterritoriality. Here it will be sufficient to refer to an official Chinese statement. In April, 1919, the Chinese delegates in Paris submitted to the Peace Conference a list of desiderata [2] for favourable consideration. One of these is the establishment of foreign post-offices in about twenty-five of the Treaty ports. Since their establishment China has been admitted into the International Postal Union (March 1, 1914) and the Chinese postal service carried over three hundred million mails at the end of 1919. There is therefore now no valid reason for the continued existence of these foreign post-offices, and their presence is a source of danger to China. There are also foreign wireless and telegraphic installations in Peking, Hankow, Tsinan and Shanghai, which should be dismantled or handed over to the Chinese authorities upon due compensation being made.

According to the International Protocol of 1901, concluded after the Boxer disturbances, a certain number of foreign troops are allowed to be stationed at twelve specified points in the metropolitan province of Chihli, so as to maintain free communication between the capital and the sea. At the Peace Conference in 1919, the Chinese delegates requested the early withdrawal of foreign troops in China, since their presence was a source of alarm to the local inhabitants, as well as a menace to the preservation of friendly relations between the local troops and foreign troops on the one hand, and between the troops of different foreign nationalities on the other.

Another suggestion made was the abolition of consular jurisdiction. The chief defects in the system referred to were the following: (1) The diversity of the laws to be administered; (2) the lack of effective control over the witnesses or plaintiffs of another nationality; (3) the difficulty of obtaining evidence where a foreigner commits a crime in the interior; (4) the conflict of consular and jurisdictional functions.

[1] *The Legal Obligations, op. cit.*, §§ 12, 13 and 15.

[2] A full list of desiderata will be found in one of the appendices to the author's new volume on *China Awakened*, which will be published by the Macmillan Company of New York and London in the autumn of 1921, under the caption of "Questions for Readjustment."

To supplement the above, the following additional remarks may be made. In the majority of consular courts an appeal therefrom must be made to the superior tribunals of their home authorities—*e. g.* in the case of a French appeal, to Saigon, in Indo-China, and in that of a German appeal, to Berlin, etc. The British and United States Governments are the only two which maintain a Supreme Court each in Shanghai, to which appeals from consular courts may be made; but even from the latter some appeals have to be carried to the District Court of California: To the Chinese directly interested the sequel of such appeals is unknown, since there are no general extradition treaties between China and other States, and the belief becomes inevitable that the foreign criminals concerned escape unpunished.

The dissimilarity of penalties inflicted by the Eastern and Western codes has its obvious weaknesses, inasmuch as for the same offence the tribunals administering the two laws may each pronounce unequal sentences. For example, accidental homicide is excusable in Western law [1]; in Chinese law the accused may not be imputable, but is nevertheless made to compensate the deceased's family.[2] Again, in the former system, criminal carelessness may not be punishable unless it results in an injury to the person of another, since any injury involving damage to property is civilly actionable; but in the Shanghai foreign settlements Chinese are convicted and sentenced to imprisonment by the Mixed Courts for carelessness resulting in damage to the property of aliens. "It is unjust and oppressive that Chinese should be subjected to a higher responsibility than the foreigners who live side by side with them on the spot." [3] This state of affairs is anything but satisfactory. It often produces friction between the foreign and local officials, and is a constant source of complaint among the Chinese.[4]

The inability of a foreign defendant to counterclaim against

[1] *Reg.* v. *Bruce*, 2 Cox., 262; *Cleary* v. *Booth*, L.R. [1893], 1 Q.B., 465.

[2] "Bentham long ago pointed out that the balance in such cases ought to incline in favour of him who suffers the injury, rather than in favour of him who commits it, and the adoption of satisfactory remedies, such as the penal remedy afforded by the Chinese rule referred to, marks a distinct feature of modern law reform, as it is recognised that laws are very imperfect upon this point."—Rice, in *American Law Review* (1908), p. 892.

[3] Rice, *op. cit.* p. 895.

[4] See Dr. Wu Ting-fang, address before the New York Bar Association, in *American Law Review* (1901), Vol. XXXV. p. 362.

a Chinese plaintiff, or *vice versa*, entails hardships and inconveniences; but it is a result of the alien immunity from process in the local courts.[1] Said the Judicial Committee of the Privy Council in *The Imperial Japanese Government* v. *The Peninsular and Oriental Company*, a case which was decided a few years before Japan freed herself from exterritorial rights :—

"It is the price which they (Britons) must pay for this immunity. . . . A British subject cannot claim the advantage of being amenable exclusively to his own consular court, and at the same time object to the limited jurisdiction which alone it possesses. If the respondents' contention be well founded, it must apply equally where a British subject brings an action in a Japanese or Chinese court in respect of a claim against a Japanese or Chinese subject. The Japanese or Chinese Court would be entitled to allow a counterclaim to be made against a British subject, and to require security to be given to satisfy the counterclaim. . . . The effect would be to deny the British subject any redress in that local court except upon the terms of his submitting to its arbitrament of a dispute which under the treaty was reserved exclusively for the determination of the British consular courts." [2]

(3) *Promise of Abolition*

Consular jurisdiction has proved in practice irksome and unsatisfactory, and as early as the last 'seventies efforts were made by China for its modification by the Powers. The negotiations failed save for the clearing up, in favour of the territorial Government, of a few questions regarding exterritoriality, which had remained ambiguous until then. Between 1902 and 1908, however, four of the Treaty Powers solemnly engaged themselves to surrender these rights when the opportune moment arrived.

As the first grant of exterritoriality was contained in a British Treaty, so the first promise of abolition was recorded in a British Convention. Article 12 of the so-called Mackay Treaty of 1902 provides as follows :—

"China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her exterritorial rights when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing."

[1] "In its administration of justice the system fails from two causes: first, from the fact that justice is administered by consular, not judicial officials; secondly, from the inherent limitations of the exterritorial court having merely personal jurisdiction." —Latter, in *Law Quarterly Review* (1903), Vol. XIX. p. 317.

[2] L.R. [1895] Appeal Cases, p. 657. For a comprehensive summary of the disadvantages of the exterritorial system, alike to the Chinese as to the foreigners, see Willoughby, *op. cit.*, pp. 70–5.

Almost identical provisions were included in the commercial agreements of the United States (Art. 15) and Japan (Art. 11) in the following year. In 1904 a similar article was inserted in the new Portuguese Treaty, but the instrument has remained unratified. Four years subsequently, Sweden declared that she would likewise be prepared so to do " as soon as all other Treaty Powers have agreed to relinquish their exterritorial rights " (Art. 10). The promise to relinquish is explicit; so are the precedent conditions for its performance. The words " and other considerations " in the British Convention may or may not be construed liberally, and Sweden will only surrender these rights when all the other Treaty Powers have similarly consented.

The consent to relinquish is admirable; it might have been perfect if it had been also coupled with a probationary time-limit clause, since to stipulate that within a definite period of, say, five or ten years, should China satisfactorily reform her judiciary in harmony with the Western systems, all exterritorial rights therein will be withdrawn or surrendered, would provide a strong incentive to a people who are doing their utmost to put their house in order. That such a provision would be efficacious is amply demonstrated by the opium suppression question.

According to the understanding of December, 1907, between Great Britain and China, the importation of Indian opium was to cease completely in ten years, if, at the end of the period, the Chinese could accomplish the suppression of all native-grown opium; this decennial period to be revisable, however, at the expiration of the first three years. The Chinese people and Government went to it with a will, and, in 1911, the agreement was modified in recognition of China's success, so that the Indian import could cease in less than seven years, provided the rate of Chinese suppression was continued. Success added to success and encouragement added to encouragement, and in April, 1913, the British Government announced the termination of the Indian trade.[1]

The exercise of consular jurisdiction being an *imperium in imperio*, the Chinese might be relied upon to achieve a similar success if some sort of probationary time-limit clause could be

[1] Owing to the political disturbances of recent years, a partial recrudescence of poppy cultivation has unfortunately occurred in three or four provinces, but it is confidently felt that with the restoration of normal conditions the *status quo* will be maintained.

written into the promise to abandon these rights. "For China," to quote Sir Robert Hart, the great Irishman who served so well for half a century as the British Inspector-General of the Maritime Customs :—

"so to speak, would be on its honour, and the whole force of Chinese thought and teaching would then be enlisted in the foreigner's favour through its maxim of tenderly treating the stranger from afar. Such a change of principle in the making of treaties would widen, and not restrict, the field for both merchant and missionary; would do away with irritating privileges and place native and foreigner on the same footing; would remove the sting of humiliation and put the Government of China on the same plane as other Governments. Restore jurisdiction (to the Chinese), and the feeling of the responsibility to protect, as well as the appreciation of (foreign) intercourse, will at once move up to a higher plane." [1]

Unfortunately, the necessary inspiration was not forthcoming, and things have been allowed to drift, although below the surface the Chinese have not been unmindful of their pledges to the outside world.

(4) *China's Judicial Progress*

In Chapter XIV of the writer's forthcoming volume on *China Awakened*, the nature of such reforms will be set out in detail. Here it should suffice to dwell upon a few outstanding features.

The first essential preliminary suggested by the recent Congress of British Chambers of Commerce in Shanghai for the abolition of exterritoriality may be dismissed in a few words, since abolition or no abolition, the Chinese will see to it that their Government shall be stable and organised. The unrest which to-day still prevails in some parts of the Republic is temporary—the inevitable aftermath of the bloodless transition from an amorphous democracy to a formal democracy which occurred ten years ago. The irresponsible militarists who have been ruling the country for the last decade will ere long be dethroned by the growing tide of public opinion, and then a new era of truly representative government will dawn.

The Chinese delegates in Paris pointed out that China has adopted a National Constitution prescribing the separation of powers, assuring fundamental rights of person and property, and complete independence of the judiciary; that she has prepared civil, criminal and commercial codes, and established three

[1] *These from the Land of Sinim* (1900), pp. 143–6.

grades of new courts, completely separating civil and criminal cases, while the police and prison-systems have been reformed. Already the Supreme Court has, after a struggle, maintained its independence both of the executive and a branch of the legislature. The Chinese High Prize Court—the first of its kind in the annals of the nation—dealt with the case of twelve enemy vessels found in Chinese waters at the outbreak of war with the Central Empires on August 14, 1917. These decisions have been translated into English [1] and have been described by an English publicist as "a definite contribution to that great field of Prize Law opened by Lord Stowell." [2]

(5) *Present Status of Russians in China*

Owing to the collapse of the Romanoffs, and the absence of a Central Government for Russia in Europe as well as Russia in Asia, China has been much concerned over the status of Russian diplomatic and consular officials accredited to her by the former Czarist Government, who have remained despite the vicissitudes of their own country. Theoretically they are no longer representatives of Petrograd: in fact, they have been repudiated by the Bolshevik commissars. Yet in practice they have been permitted to exercise their usual functions. On September 23, 1920, however, the Chinese Government considered it advisable to withdraw all diplomatic and consular privileges from the Russian officials in China, until a stable Government for all Russia, recognised by the Powers, should have been established. A Presidential Mandate promulgated on the same day reads as follows:—

"Considering the geographical propinquity and the long-existing friendly relations between Russia and China, we wish it to be understood that our friendly relations with the Russian people remain the same, despite the fact that we shall cease to treat their Minister and Consuls as diplomatic agents. The life and property of all peaceful Russian residents in this country shall be entitled to the protection of the Government as heretofore. While continuing to maintain strict neutrality towards her internal strife, this country shall hereafter assume the same attitude towards Russia as the Allied and Associated Powers. Affairs in connection with the Russian Settlements, the Railway Zone of the Chinese Eastern Railway, and the Russian subjects in this country shall be dealt with by the Ministries and the Chief Officials of the provinces concerned."

[1] Dr. F. T. Cheng, *Judgments of the High Prize Court of the Republic of China* (1919).

[2] J. E. G. de Montmorency in the *Contemporary Review*, April, 1920.

The effect of this new situation is to withdraw from the Russians their former rights of exterritoriality, since their Consuls are no longer competent to exercise judicial functions. Without warning, the new Chinese Courts are thus called upon to take over the protection of Russian life and property. The arduousness of this task may well be imagined, considering the dearth of officials who are versed in the Russian language and their unfamiliarity with Russian ways and manners. The Russian Courts in Harbin and other parts of the Railway Zone of the Russian-concessioned Chinese Eastern Railway having been taken over by the Chinese, with the assistance of Russian assessors, instructions were issued by the Ministry of Justice in Peking to the High Court of Appeal and the corresponding Procuratorate in Harbin for their guidance as regards trials and judgment, the necessity for speedy procedure and equality of treatment.

(6) *Programme of Abolition*

Such being the codification of new laws and arrangements for their administration, the question arises: Has the time arrived to justify Great Britain, the United States, Japan and other Treaty Powers in relinquishing their exterritorial rights? An answer to this may be suggested by a survey of the situation in general.

As already stated, the Chinese Peace Delegation at Paris submitted a list of desiderata, including the abolition of consular jurisdiction in April, 1919. The following extract from the Memorandum shows their proposals under this head:—

"China, therefore, asks that the system (*i. e.* of consular jurisdiction) will also disappear in China at the expiration of a definite period and upon the fulfilment of the following conditions:—

"(1) The promulgation of a Criminal, a Civil, and a Commercial Code, a Code of Civil Procedure and a Code of Criminal Procedure.

"(2) The establishment of new courts in all the districts which once formed the chief districts of the old prefectural divisions, that is to say, in fact, in all the localities where foreigners reside.

"China undertakes that by the end of 1924 the above-mentioned conditions shall be fulfilled. On the other hand, she requests the Treaty Powers to give their promise that upon the fulfilment of the conditions they will at once relinquish their consular jurisdiction and the jurisdiction of their special courts (if they have any) in China.

"Before, however, the actual abolition of consular jurisdiction, China asks, furthermore, the Powers to give immediately their consent to:—

"(*a*) That every mixed case, civil or criminal, where the defendant or accused is a Chinese, be tried and adjudicated by Chinese Courts without the presence or interference of any consular officer or representative in the procedure or judgment.

"(*b*) That the warrants issued or judgments delivered by Chinese Courts may be executed within the concessions or within the precincts of any buildings belonging to a foreigner without preliminary examination by any consular or foreign judicial officer."

In other words, the contemplated abolition is not to be immediate or absolute, but upon the lapse of a definite period and the fulfilment of certain events. That seems to be a reasonable enough request; unfortunately, without expressing any opinion on the merits of the particular question, the Peace Conference merely informed the Chinese delegates in effect that, while the Powers were in sympathy with China's aspirations, they could not at the Conference hope to discuss matters which were not concerned directly with the restoration of peace to Europe.

On the other hand, Professor W. W. Willoughby of Johns Hopkins University, and former American Legal Adviser to the Chinese Republic, has expressed the following opinion in his latest work, published a year ago, with regard to the foregoing argument of the Chinese Delegation :—

". . . . Though the abolition of the exterritorial system is a highly desirable end, from the standpoint of the foreigner as well as from that of the Chinese, it would not be well to attempt to do this until it is made certain, as a matter of actual fact, and not as one of paper regulation or declared intention, that there exists in China a fairly complete system of courts which, by reason of the learning, experience, probity, and freedom from political or executive interference of their presiding judges, command the confidence of the Western Powers. It is the author's opinion that it is doubtful whether, without foreign aid, the Chinese will be able to create a judicial organisation that will actually function so as to satisfy Western requirements. To his mind the most promising mode by which the Chinese could be aided in bringing about a situation under which it would be expedient to abolish exterritoriality would be for the Powers to permit the Chinese, as a first step, to establish courts for the trial of cases in which foreigners are parties either as defendants or plaintiffs, that would be truly 'mixed' in character; that is, tribunals presided over by two or more judges, of whom at least one should be a foreigner learned in the law and experienced in its administration. These courts would be Chinese courts, and the judges Chinese officials, the judges who are foreign, however, to be appointed upon the nomination of, or at least with the approval of, the Foreign Offices of the Treaty Powers. In those cases in which the judgments rendered are not approved by the foreign judge, a right of appeal should lie to a superior court, and the cases heard before a panel of judges of whom a majority should be of

foreign nationality. If it should be found that the Chinese authorities and the Chinese judges were disposed to give a whole-hearted co-operation in this scheme, and satisfactory results were attained, the participation of the foreign judges might be gradually lessened, until the Chinese judicial system would become fully freed from all exterritorial elements. In other words, China might be started upon the road along which the Kingdom of Siam has already made such considerable progress." [1]

A cursory comparison between the arguments of the Chinese Delegation and Dr. Willoughby might suggest a divergence of views, but, as a matter of fact, they seem to be not irreconcilable with each other. If anything, the proposal of Dr. Willoughby to include foreign participation would be only complementary to the time-limit and fulfilment of definite conditions advanced by the Chinese Delegation.

(7) *A Suggested Programme*

For practical purposes, and in view of all the circumstances, the writer would here submit what seems to be a workable programme of abolition of exterritoriality. It should be understood, however, that all ideas of immediate abolition or wholesale relinquishment must be abandoned. China, with a territory of four and a half million square miles and a history of at least four thousand years, is too unwieldy for a plan of immediate and wholesale abolition to be executed with success; such an experiment would be bound to fail, and the resultant confusion would be worse than the present. Exterritoriality has existed in China for eighty years; its abolition can certainly not be accomplished overnight.

In justice to the Chinese, the Treaty Powers who have already signified their willingness to assist them in their judicial reforms should, in the first place, do more than utter the mere promise to assist. As a policy of expediency, as well as of statesmanship, a new agreement may be entered into for this precise object, and assuredly the multitudinous interests involved are sufficiently important to warrant the conclusion of a special convention. On the other hand, the Chinese should welcome the participation of foreign lawyers in the administration of their new courts, especially in those which try cases between foreigners and Chinese. Since it will take five years, at least, to complete the codification of civil and commercial laws, such a Treaty might

[1] *Op. cit.* (1920), pp. 79–80.

provide that the Powers will surrender a portion of their exterritorial rights upon the promulgation of all the new codes. These codes will require experimenting with for a few years; therefore the Powers may promise to relinquish a further portion of their exterritorial privileges, say, five years from the date of promulgation of the latest code. At the end of ten years of co-operation between the two sides it is conceivable that no mean progress will have already been made; wherefore, the relinquishment of the final trace of exterritorial rights might be arranged to take place as soon as China can show that she is reasonably able to accord both protection and justice to foreigners in her territory, this period to be probationary, say from two to five years, depending upon the success of China's cumulative efforts.

That is to say, the total abolition of exterritoriality in China would occupy at most fifteen years. In return China should offer to throw the entire country open to foreign residence and trade in three corresponding stages, beginning with the districts nearest to the coast or " ports " which are already declared open to foreign trade, and ending with districts furthest removed from foreign contact and intercourse.

The idea of dividing exterritoriality into three portions may sound whimsical; but from the point of view of exterritoriality as enjoyed in China the scheme is not impracticable. For with the exercise of consular jurisdiction there have grown up under its ægis many irrelevant adjuncts in the face of China's opposition. Without in any way affecting the administration of justice as usually interpreted, such extraneous growths may be abolished at an early date, if not immediately. *Pari passu*, however, with the gradual abolition of exterritoriality, the convention should also provide for the reorganisation of existing, or the institution of new, mixed tribunals, as part and parcel of the scheme of judicial reform. A start in this direction may be agreed to be made in large Treaty Ports, that is, in cities which already possess a mixed population of Chinese and foreigners, where the effect of foreign participation will be at once felt, and where the proposed reform will have perhaps the best baptism of probation.

In regard to the element of foreign participation it does not appear to be wise to stipulate beforehand how the foreign judges should be nominated, but their appointment should be left entirely to the Chinese. On the other hand, the Chinese Govern-

ment should offer to employ the best foreigners available for the purpose, whether in or out of China, and irrespective of nationality. To ensure that such foreign participation is not mere make-believe, the Chinese will be well advised to engage foreign lawyers not only as judges, but also as procurators, and their powers should not be merely advisory or consultative. In this way the necessary confidence will be inspired among all parties.

In elaboration of the proposed three stages of abolition, the agreement should bind the Treaty Powers, at the first stage, to assist in the reorganisation or institution of Mixed Tribunals; in the second stage, to abolish their consular courts; and in the final stage to restore to the Chinese all jurisdiction over their nationals in China.

Finally, the convention should contain the incentive clause that the fifteen-year period may be curtailed or extended upon the satisfactory or indifferent performance of China's share of the bargain; such acceleration or retardation of the abolition programme, of course, to be operative likewise upon the provision governing the simultaneous opening of the country to foreign trade and residence. This will not only put the Chinese on their honour, but will also induce the foreigners in their midst really to assist the Chinese to consummate their objects speedily, to the common benefit of all.

(8) *Benefits of Abolition*

Now whether this programme will be adopted or not, either in part or *in toto*, time alone will determine; but indications go to show that some such scheme will have to be taken into serious consideration.

Pending such abolition by the Treaty Powers, China has lost no opportunity to attain her cherished desires. Within twelve months new agreements with at least three States have been concluded in which China has reserved to herself all jurisdiction over the life and property of their nationals in her territory. In May, 1920, Bolivia concluded its first Treaty with China, followed by Persia a month after. In both it was distinctly understood that neither Bolivians nor Persians were entitled to enjoy any exterritorial rights or privileges in China. Recently, on May 18, 1921, Germany similarly agreed to forgo her former rights of exterritoriality in China, in the first preliminary Treaty

concluded between Berlin and Peking after the cessation of a state of war between the two countries.[1] Reuter's summary of the Treaty telegraphed from Peking, added :—

"The agreement includes a German declaration consenting to the abrogation of German consular jurisdiction in China, but regrets the inability of the German Government to restore the rights of China in Shantung. . . . The Chinese Foreign Minister, in a note replying to German queries, says : 'Firstly, the Chinese Government promises full protection to German residents; and, secondly, lawsuits in which Germans are concerned shall be tried in modern courts by modern codes, and the assistance of German lawyers shall be permitted.'"

These new treaties are important and mark a distinct change in the self-respecting attitude of New China. Their number could have been increased if Poland, Czecho-Slovakia and one or two other States who had tried to negotiate similar agreements with China had been prepared to exchange the dubious rights of exterritoriality for the unquestionable rights of unlimited trade in the vast Republic.

It may be that motives of expediency were responsible for the consent of these States to forgo the rights of exterritoriality, or it may be that they could not help acceding to China's terms of the bargain. Nevertheless, they must have weighed the pros and cons in the balance and been convinced of the greater benefits resulting from a denial of these rights.

From the point of view of the preponderant majority of aliens who go to China pre-eminently to engage in trade, the commercial aspect of the after-abolition benefits will be most appreciated. For abolition or no abolition, foreign missionaries as distinct from the trading class are, under the existing Treaties, entitled to reside likewise in the interior and carry on their humanitarian work. But as long as aliens in China are not amenable to the jurisdiction of the territorial government, their merchants will be restricted, as at present, to the open or Treaty Ports, or to demarcated areas therein which are reserved therefor. The vast interior is to them a sealed book, together with its limitless possibilities for trade and industry. Indeed, armed with passports, they may travel in the unopened interior, but all commercial activities must be confined to the Treaty Ports. They are similarly debarred from engaging in independent

[1] A state of peace between China and Germany was proclaimed in Peking by a special Presidential Mandate on August 1, 1919.

mining operations, unless they consent to submit to the jurisdiction of local courts.[1]

Should exterritoriality be once abolished, then all Treaty restrictions will be removed. There will be no necessity for the present foreign concessions and settlements, Treaty Ports, passports, etc., and their irksome regulations. All aliens will be free to roam at will over China's four million square miles, and they may trade or engage in mining, as well as other industries, wherever they please. There will be no place for consular courts, and foreign consuls will no longer be called upon to function as judicial officials. Then trade and commerce between China and the world will grow in leaps and bounds. That is a peep into the future which is by no means exaggerated. All that is required is for the Treaty Powers to help China to expedite its realisation.

Meanwhile it may be pointed out that the Germans have accomplished what may yet prove to be a commercial *coup* by their consent to forgo their former exterritorial rights. Already it seems that their self-denial is producing a favourable impression on the Chinese mass psychology, and it certainly requires no astute mind to see through the motives behind their action—namely, the recapture of their lost trade in China. Prior to 1914 the Germans had built up a considerable volume of business, which was, of course, sacrificed during the war. With the restoration of peace they hope, like the Allies, to make up for lost time. And in so doing they have the sagacity to go a step further than the Allies. By consenting to a denial of exterritoriality they undoubtedly ingratiate themselves with an influential section of China's population, and this auspicious beginning will prove valuable to their future commercial intercourse with the Chinese. Added to this is the fact that under their new Treaty the Germans are entitled to engage in trade in the vast interior of the country, whereas the Allied merchants have to content themselves with the fifty-odd Treaty Ports, and it will be readily perceived that future German competition in the international market of China will be quite formidable.

(9) *Extraneous Growths of Exterritoriality*

Reference was made above to various practices which have grown up in China under the ægis of exterritoriality, such as

[1] Cf. Tyau, *Legal Obligations*, *op. cit.*, and also Koo and Willoughby, *op. cit.*

the establishment of foreign post-offices and the stationing of international garrisons, etc. These anomalies have been maintained, however, in spite of the protests of the territorial government, and on several occasions they have impinged gravely upon the best interests of the territorial authorities.

It surely cannot be contended that they, too, will have to depend upon the codification of satisfactory laws and the satisfactory administration of these laws. In justice to the Chinese, as well as from a sense of fair play on the part of the Treaty Powers, the semi-political appendages of exterritoriality should be separated and divorced from exterritoriality proper in any discussion of abolition of exterritorial rights in China.

Conclusion

Immediately upon receipt of the official announcement that a state of war had been declared between China and the Central Powers, cordial telegrams were despatched by the Allied and Associated Governments, and one and all assured Peking that they "would do all that rests with them to ensure that China shall enjoy in her international relations the position and regard due to a great country." [1]

That was in August, 1917. Two and a half years subsequently, in Paris, the Chinese Delegation submitted to the Peace Conference a lengthy list of desiderata,[2] but the Conference did not feel competent to devote any discussion thereto. However, late in April, 1919, just before the classic Shantung decision was awarded in favour of Japan, the Three Great Powers thus addressed themselves substantially to the Chinese Delegates :—

"As soon as the proposed League of Nations is established, we will give China all our assistance, and aid her to remove all present inequalities, as well as restrictions upon her legitimate rights, so that the Republic of China shall truly become a perfect, independent, sovereign, great State. . . . Such sentiments, we are happy to state, are also shared by Baron Makino, who will likewise be glad to assist in this worthy direction." [3]

[1] Cf. Chapter XVII. of the writer's *China Awakened*, on China's Entry into the Great War.

[2] As submitted to the Peace Conference the list, known as "Questions for Re-adjustment," occupies over forty foolscap-size printed pages, including sixteen appendices. The other desiderata, besides those already mentioned, are Renunciation of the Spheres of Influence or Interest, Relinquishment of the Leased Territories, Restoration of Foreign Concessions and Settlements, and Tariff Autonomy.

[3] Cf. Chapter XVIII. of *China Awakened*, on China's Participation in the Peace Conference.

Since then the Republic has signed the Austrian, Bulgarian, and Hungarian Peace Treaties, and become an original member of the League of Nations. The First Assembly of the League has met at Geneva, and China has been elected to a seat on the Council of the League for the year 1921. The Second Assembly of the League will perhaps be sitting at Geneva when this Year Book is published, but the fine promises of the Powers remain to be redeemed. How long, it may be asked, will it take China's co-partners in the late War to aid her in removing exterritoriality and other present inequalities, as well as restrictions upon her legitimate rights?

THE WORK OF THE LEAGUE OF NATIONS

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On January 10, 1920, the League of Nations came into existence as a political institution. Previously it had been an unrealised conception. The bringing into force of the Treaty of Versailles, in the forefront of which the Covenant of the League had been embodied, gave it life. It had been provided that upon the deposit of ratifications by three Great Powers and by Germany the Treaty should take effect; and upon that date the necessary ratifications took place.

Directly the Treaty of Versailles was ratified it became necessary for the League to take action. Under Article 48 a Commission, three of whose members were to be appointed by the Council of the League, was directed, within fifteen days of the coming into force of the Treaty, to delimit the frontier lines prescribed for the Saar Valley; and there were several other matters of urgency, such as the appointment of the High Commissioner for Danzig, and of the Governing Commission of the Saar Valley, which, although not specifically directed to be performed within a definite time, called for early consideration. Furthermore, there was the whole organisation of the League to undertake. It had also to be arranged when and where the Assembly should meet. A large amount of valuable preliminary work had been carried out by the Secretary-General, Sir Eric Drummond, who had selected a highly qualified international staff and obtained temporary premises for accommodating the League in London. But all his arrangements were necessarily of a provisional nature and required the confirmation of the Council.

No time was lost in calling the Council together. On the morning of January 16, within a week of the coming into force of the Treaty, the Council met in the Salle de l'Horloge of the French Foreign Office. M. Léon Bourgeois, the eminent French representative, was unanimously elected to the chair. The Secretary-General was invited to take his seat on the left of the

President. After a few brief speeches in which the members voiced the sincere intention of their respective Governments to observe the Covenant and utilise the League, the necessary appointments to the Saar Valley Delimitation Commission were made, and the Council then stood adjourned to a date three weeks later, when it met in London to grapple seriously with the volume of work already awaiting it.

Since January 15, 1920, the Council has met thirteen times, and is at the moment of writing[1] in session at Geneva. The Assembly, which is a large deliberative body composed of not more than three representatives of each of the Member States of the League (*i. e.* about 150 in all), held its first session in November, 1920, at Geneva, just a year later than had originally been intended. It will meet for the second time in September 1921. A number of conferences and commissions appointed by the League have also taken place during the period since January 1920; and there have been considerable activities undertaken by the International Labour Organisation.

For the purposes of this paper, which is rather to describe the work of the League since its inception than to explain the machinery by which it carries out its purposes, it seems best to consider the subject from the following definite aspects, and to give under these heads a necessarily brief outline of what has actually been done, irrespective of the particular organ of the League that did it.

Organisation

A vitally important task of the League in these early days has been that of organisation. The Covenant deals with this problem only in the widest terms. It prescribes the principal organs to be a Council, and an Assembly, with a Permanent Secretariat; it lays down the composition of these bodies and gives a general direction or two with regard to their work. But their spheres of action were left necessarily somewhat indeterminate. A few specific functions were indicated for each, and, for the rest, they were given concurrent jurisdiction to deal "with any matter within the sphere of action of the League or affecting the peace of the world." Each, however, from its composition, is seen to be marked out for different purposes. Thus the Assembly described above is a large deliberative body,

[1] June 24, 1921.

difficult to call together frequently and, from its completely representative nature, more fitted to deal with fundamentals, to settle broad lines of policy and to exercise a parliamentary control over expenditure. The Council, on the other hand, is a small body composed of the representatives of only eight members of the League, namely, four permanent members, Great Britain, France, Italy and Japan,[1] and four members elected by the Assembly, at present Belgium, Brazil, China and Spain. Such a body is obviously better fitted than the Assembly to wield executive functions. Indeed, until quite late in the Peace Conference, it was described in the draft Covenant as the Executive Council.

How far the Council is to be considered responsible to the Assembly for its actions is not very clear. But that some such responsibility is admitted, is evidenced by the fact that the Council presents to each session of the Assembly a report on all that it has done since the previous Assembly; and this report is treated in the Assembly as an opportunity for reviewing in open debate the whole policy of the League and the general conduct of its affairs by the Council. It was recognised at the first Assembly that the Assembly was the proper organ of the League to pass the Budget and authorise expenditure, and since then an amendment to the Covenant has been put forward by the Amendments Commission to make this procedure an integral part of the constitution of the League. As time goes on we shall undoubtedly see the respective spheres of action of the two bodies becoming more and more defined; indeed, it does not seem to be too much to expect that before long something in the nature of Cabinet responsibility will arise between the Council and the Assembly, except perhaps in those matters in which, under the Covenant and the Treaties of Peace, the Council has sole competence.

Under the Covenant the Council and, by its own decision, the Assembly, must meet at least once a year. In practice during 1920 the Council met eleven times, and as a general working rule has decided, in the absence of special reasons to the contrary, to meet every two months. The Permanent Secretariat corresponds more than anything else to an international Civil Service.

[1] The United States of America is named in the Covenant as a permanent Member of the Council, and presumably, if it were to join the League, would be entitled to retain that permanent membership.

Its functions are to prepare the work of the Assembly and Council, and to undertake all routine duties in connection with carrying out their decisions. It is divided into sections corresponding to the various activities of the League.

In order, however, to give effect to those provisions of the Covenant which cast upon the League constructive duties other than the preservation of peace and the maintenance of international good order, and, indeed, to enable it to deal effectively with such contributory causes of war as excessive armaments, it has been necessary to bring into being a number of subsidiary organisations. Thus Article 23 of the Covenant calls upon the League to provide for freedom of transit and communication, to take steps in the interest of international health, to supervise the arms traffic, to concern itself with putting down the traffic in women and children and in dangerous drugs, and to co-ordinate endeavours to improve the general conditions of labour in the world. These requirements have called for the creation of such bodies as the General Conference on Transit and Communications, with its Advisory and Technical Commission, the International Health Organisation, the Advisory Committee on Traffic in Opium and Dangerous Drugs, the Temporary Mixed Commission for the Reduction of Armaments, the International Blockade Committee for examining the application of Article 16 of the Covenant, the Permanent Mandates Commission for assisting the Council of the League on questions relative to Mandates, and the Permanent Advisory Commission of Military, Naval and Air Experts provided for in Article 9 of the Covenant. The work that has been carried out by these various bodies will be described later.

The International Labour Organisation actually came into being earlier than the League, for the Treaty of Versailles provided that its General Conference, which corresponds to the Assembly of the League, should be held in Washington in 1919; and President Wilson convened it for October. This organisation consists of a General Conference, which meets at least once a year; a Governing Body of twenty-four members representing the eight chief industrial States of the world, and four other States nominated by the Government delegates to the General Conference, and meeting about every two months; and the International Labour Office, an institution similar to the Secretariat of the League, but under the control of the Governing

Body. The second meeting of the General Conference took place in Genoa in June 1920. The third meeting will take place at Geneva in October of this year. It would be quite impossible within the compass of this paper to do justice to the work of this organisation. The writer has therefore judged it best to attempt no more than the barest outline of its machinery.

Important as these preliminaries have been, perhaps the most important piece of organisation attempted by the League has been that of the Permanent Court of International Justice. The creation of such a Court has baffled the ingenuity of jurists for generations. At the second meeting of the Council it was decided to delegate to an international committee of jurists the task of preparing a draft scheme. This committee, upon which the British member was Lord Phillimore, whilst America was represented by Mr. Elihu Root,[1] met at the Hague during June and July 1920. Their draft scheme was laid before the Council in August, and after some slight modification was adopted for transmission to the Assembly. After some further modification it was adopted by the Assembly in December last, and only awaits the ratification of the members of the League to be put into operation. The Court will be composed of eleven judges and four deputy judges, elected simultaneously by the Council and the Assembly upon a system devised by the Committee of Jurists from an agreed list of names obtained in a manner also devised by the Committee.

It is to have jurisdiction in " all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force." The contracting States may adopt compulsory jurisdiction in relation to each other in disputes concerning :

(*a*) The interpretation of a treaty;
(*b*) Any question of international law;
(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;
(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

[1] The remaining Members were : M. Adatei (Japan), M. Rafael Altamira (Spain), Baron Descamps (Belgium), Dr. Hagerup (Norway), M. de Lapradalle (France), Dr. Loder (Holland) and M. Ricci-Busatti (Italy).

Political and Administrative Activities

The political tasks of the League have so far fallen into two categories, those entrusted to it by the Treaties of Peace, and those in which its good offices have been sought by interested States.

Under the first category fall the League's administration of Danzig and the Saar Valley, and the decision upon the allocation of Eupen and Malmédy. In the last case, the League, after considering and dismissing an appeal by the German Government, decided to award the territories to Belgium.

In the case of Danzig, which was established as a free city by the Treaty of Versailles, the principal duty of the League, having appointed a High Commissioner to reside in Danzig on its behalf, is to guarantee the constitution of the city when it has been drawn up by the representatives of the city and the High Commissioner. The High Commissioner, who at present is General Sir Reginald Haking of the British Army, is also entrusted, on behalf of the League, with the task of dealing, in the first instance, with all differences arising between Poland and the Free City in connection with the Treaty. The work of drawing up the constitution has proved a difficult one. The draft has been several times before the Council of the League, but it has appeared to require remodelling on more democratic lines. The Popular Assembly of Danzig has recently been consulted on the matter, which is still before the Council, but a solution is probable during the present session. Various other questions concerning Danzig have also been settled by the Council. In particular it recently refused consent to the carrying out by the Free City of an order for military rifles. Another problem which has exercised the League in connection with Danzig has been that of defence. After much deliberation it has now been decided by the Council to entrust the Polish Government with the land defence of Danzig, and also with the maintenance of order in the territory of the Free City, should the local police prove insufficient, or in the event of a threat of aggression.

In the case of the Saar Basin the League Governing Commission has exercised jurisdiction there since February, 1920, and appears to have discharged its duties satisfactorily. The composition of the Governing Commission is: one French member, M. Rault the President, one member from the Saar Valley, Dr. Hector, and three members selected from three countries other than France or Germany, namely, Major Lambert,

Belgium, Count de Moltke Huitfeldt, Denmark, and Mr. R. D. Waugh, Canada. This Commission exercises jurisdiction on behalf of the League and, in accordance with the Council's instructions, renders regular reports on its administration and on the conditions in the territory.

There have been a certain number of complaints by the German Government against the presence of French troops in the area and against the exercise of jurisdiction there by French courts martial. The courts martial were a temporary expedient pending the creation of the Court of Justice directed to be formed in that area by the Peace Treaty; the Court of Saar-brücken has now been selected by the Saar Governing Commission to carry out those duties. The French troops referred to were a small garrison stationed in the area to preserve order.

In August of last year a strike of the civil employees threatened to disorganise the administration, but the matter was promptly taken in hand by the Commission, who proclaimed a state of siege and expelled a number of disaffected persons from the area. This was also a subject for complaint by the German Government. The German complaints were fully investigated by the Council of the League, who, after hearing the explanations of M. Rault, the chairman of the Governing Commission, dismissed the charges and congratulated the Commission upon "the spirit of wisdom, goodwill and liberalism which has characterised its administration."

The political activities of the League other than those delegated by the Peace Treaty have been in connection with the disputes between Poland and Lithuania, the question of the Aaland Islands, the appeal of Albania, the protection of Armenia, the protection of Minorities, and the Commission of Inquiry to Russia. The last of these did not proceed far. It was suggested to the Council of the League by the Supreme Council on February 24, 1920, that, with a view to obtaining impartial and authoritative information regarding the conditions in Russia, it would be of great value if the League would undertake to send a Commission for that purpose in conjunction with a Commission which the International Labour Organisation had previously proposed to send for its own purposes. The Council thereupon communicated with the Soviet Government, offering to undertake this task if the Soviets were prepared to give the necessary facilities. The Soviet Government of Russia, however, after

some delay, replied with what was virtually a refusal, and the project was thereupon abandoned.

The case of Armenia, like the proposed Commission to Russia, came before the League from the Supreme Council, which in March, 1920, proposed that the Armenian State should be placed under the protection of the League. It had been proposed by the Supreme Council that America should undertake a mandate for Armenia, but this proposal the American Government did not feel able to accept. Subsequently, after the matter had been debated at some length in the Assembly of the League in November and December last, President Wilson and the Governments of Spain and Brazil agreed to serve as mediators between Armenia and the Kemalists. The question, however, has proved to be deeply involved with questions of general politics, and further complicated by the non-ratification of the Treaty of Sèvres. The Council of the League has kept in touch with the situation, but has not been able to carry the matter any further.

The duties of the League with regard to Minorities are laid down in special clauses of the Treaty of Peace. Numerous linguistic and racial minorities exist in Central and Eastern Europe, in the midst of majorities of a different nationality. These minorities may address protests and submit reports to the League. In this connection a dispute was recently regulated between Poland and Austria regarding the Jews who had come from Eastern Galicia into Austria and were threatened with expulsion by the latter. The Council succeeded in obtaining guarantees for these Jews on the part of the Governments concerned. It also intervened on the question of the emigration of Bulgarian minorities from Greece to Bulgaria and *vice versa* to the satisfaction of both parties.

The outstanding political problems of the League, however, have been those of Poland and Lithuania and of the Aaland Islands. In the first of these cases the subject of dispute was the Polish-Lithuanian frontier, and especially the destiny of Vilna, a city lying in Lithuanian territory, but containing a Polish majority. When hostilities were on the point of breaking out, Poland took the case to the League; and Lithuania, which is not a member of the League,[1] accepted the jurisdiction of the Council. A League Commission was then appointed to

[1] She is, however, like the other Baltic States, a partial member, having been admitted with them at the last Assembly as a member of the League's Technical Organisations.

proceed to the spot and supervise a strict observance by the parties of the pledge they had given to respect a provisional boundary line. Meanwhile negotiations between the two parties were proceeding, under the ægis of the League, when General Zeligowsky, with an irregular force of Polish troops, surprised Vilna and occupied it. This action was officially disavowed by the Polish Government, but General Zeligowsky remained in possession of the town. Fortunately, however, the Council was able to restrain both sides from committing any further hostilities, and, after considerable discussion, they agreed to the organisation of a plebiscite. In practice, however, this proved almost impossible to carry out, the matter being greatly complicated by General Zeligowsky's presence. Accordingly, in February of this year, after hearing all parties and the President of the Plebiscite Commission, the Council agreed to substitute, in place of the plebiscite, direct negotiations between Poland and Lithuania under the presidency of M. Hymans, the Belgian representative. These negotiations began in May last, after a number of private conversations had taken place between the League representative and both delegations, with a view to arriving at the fundamental points at issue. It was agreed to examine the problem of the relations between the two countries as a whole, assuming hypothetically that the question of Vilna had already been settled. The purpose of this was to discover whether a rapprochement was possible between the two countries on their foreign policy, customs régime and the employment of their military forces. These negotiations led to the project of a defensive military convention and of an economic accord. The question of Vilna was then approached, but here it was evident that the difference of view between the two parties was still considerable. M. Hymans then offered to draw up a programme to serve as a basis for discussion. This was agreed to. The programme has been laid before both parties, who have promised to decide at an early date how far it can be taken as a basis of discussion. M. Hymans presented a report on the subject to the June meeting of the Council, and the matter is still proceeding.

The question of the Aaland Islands is a dispute between Sweden and Finland. Additional interest is given to it by the fact that it is the first instance of a State exercising its "friendly right" under Article 11 of the Covenant to bring to the attention of the Council circumstances threatening "to disturb international

peace or the good understanding between nations upon which peace depends." On June 19, 1920, the British Government, alarmed at the tension between the two countries concerned, called upon the League to intervene in the interests of peace.

The Aaland Islands are a small archipelago lying in the Gulf of Bothnia, almost midway between the Swedish and Finnish coasts. In 1809, by the Peace of Fredrikshamn, Finland and the Islands were both taken from Sweden by Russia and formed together into the autonomous Grand Duchy of Finland. When Finland broke away from Russia in 1917, she took the Islands with her; but the inhabitants are almost exclusively Swedish, and claimed, on the principle of self-determination, the right to return to Sweden.

The matter was placed on the agenda of the Council, and representatives of both countries came before it and took part in the deliberations. Finland raised the point under Article 15 that the dispute arose out of a matter which by international law was solely within her "domestic jurisdiction." This plea was referred to an International Commission of Jurists, who advised that it could not be sustained. The Council ruled accordingly, and, having heard the parties and considered a statement put forward by the delegates of the population of the Aaland Islands, appointed a Commission of Inquiry to proceed to the spot, obtain evidence and submit a report. This Commission, which was composed of Baron Beyens (Belgium), M. Calonder (Switzerland) and Mr. Elkus (U.S.A.), completed its work in the spring of 1921, and presented a report to the Council setting out that the principle of self-determination did not apply, and recommending that the sovereignty of Finland over the islands be declared, subject to certain guarantees protecting the islands from losing their distinctive characteristics and institutions, and in particular safeguarding the Swedish language. The Council has decided to assign the Islands to Finland. They are to be neutralised from a military point of view. Sweden and the Islanders have accepted the verdict of the League.

A further political question, which may conceivably put the League in a position to exercise a wholesome restraining influence over Balkan politics, has arisen in connection with the relations between Albania and her neighbours. Albania, who was admitted to the League at the last Assembly, appealed for the intervention of the Council in connection with what she alleges to be acts of

violence and pillage on the part of Jugo-Slavia, and the illegal occupation of certain villages within her frontiers by Greece. This question was also before the June Council, to which all three Governments concerned were invited to send representatives.[1]

Economic and Financial Activities

At the second meeting of the Council in February, 1920, it was decided to hold a Financial Conference to study the situation created by the war, and to endeavour to find suitable remedies. This Conference, which necessitated an immense amount of careful documentation and other preparatory arrangements, took place in Brussels in September, 1920, when the representatives of thirty-five nations, including the United States, met together under the presidency of M. Gustav Ador, the former president of the Swiss Confederation. This Conference collected a great amount of financial information and laid down a series of principles calculated to re-establish normal economic conditions. The most striking discovery made by the Conference was the fact that every European country that took part in it, excepting only Great Britain, was spending more than its income; and that the deficit would, on the average, be more than made good if expenditure on armaments were to cease. Its most important achievement was the evolution of the ter Meulen scheme for International Credits.

In order to give effect to the recommendations of the Conference, and to assist the Council in the consideration of technical questions of economics and finance, a Provisional Committee was then appointed. By the decision of the Assembly an Advisory Commission has now been substituted for that body. Early this year, in response to an invitation from the Governments of France, Great Britain, Italy and Japan, this Commission agreed, subject to certain conditions, that it would undertake the task of re-establishing the financial situation of Austria. A Commission of Inquiry was immediately despatched to Austria to examine the conditions prevailing there; it reported to the full Commission in London on May 23 last. On the basis of this report a scheme was drawn up, the principal features of which were the creation of a new Austrian Bank of Issue and of a Committee of Control responsible to the League, the imposition

[1] Since writing the above, the question has been sent for consideration to the Council of Ambassadors—an unfortunate precedent.

of certain legal mortgages on Austrian real estate, re-organisation of the Administration, and the flotation of an internal loan. This scheme will be put into operation in conjunction with the ter Meulen Credits Scheme. As soon as all interested Governments have agreed to the conditions put forward by the Financial Committee with regard to the suspension of their liens on Austria, the work of economic re-establishment can immediately begin. It is confidently expected that other impoverished countries will avail themselves of this machinery for restoring their credit.

Humanitarian Activities

In March, 1920, the Council, which had been gravely exercised by the alarming spread of typhus in Eastern Europe, appealed for funds, formed an Executive Committee and despatched a representative, Dr. Norman White, to carry out an investigation in Poland. Immediate effective action was not possible owing to the difficulty of obtaining money, but, during the Assembly, considerable contributions were promised. Up to the present over £200,000 has been subscribed, and much valuable help has been rendered to the Polish authorities. The Consultative Committee of the League Epidemic Commission visited Poland during April, and examined the manner in which the typhus campaign was being conducted. Considerable medical supplies of various kinds and a number of motor ambulances have already been despatched to Poland, and the Epidemic Commission is furnishing fifty hospitals of fifty beds each, as well as further clothing, supplies, and transport.

A great humanitarian work undertaken by the League has been the repatriation of the enormous numbers of prisoners of war who, by reason of the chaos in Russia and the confusion into which Central Europe was thrown by the defeat of Germany and the collapse of the Austro-Hungarian monarchy, were left stranded in those territories at the conclusion of the Great War. The matter came before the League at the instance of the Supreme Economic Council in February, 1920. The Council took up the matter at once, and, during April, appointed Dr. Nansen, the Norwegian explorer, as its High Commissioner to undertake the work. Dr. Nansen threw himself into this work with characteristic energy and organised it with such success that by the end of the year he was able to report that he had

completed the task. Three hundred thousand prisoners of war were returned to their homes.

The League's work in connection with the Opium Traffic and the Traffic in Women and Children is only just beginning. The control of the opium traffic, which, under the Hague Convention of 1912, had been entrusted to Holland, has now been taken over by the League, which has appointed an Advisory Commission. This Commission, having examined the whole problem, is now taking steps to bring about the enforcement of the Convention. With regard to the White Slave Traffic, an International Conference has been convened at Geneva; and a Committee of Inquiry has been formed to investigate the problem.

Technical Activities

As has already been stated, the League is required, under Article 23 of the Covenant, to undertake a number of duties of a more or less technical nature, such as the maintenance of fair and humane conditions of labour, freedom of communication and transit, equitable commercial treatment, and the prevention and control of disease. Actually its duties with regard to opium and the White Slave Traffic are also imposed upon it by this section; but it has been judged more appropriate to refer to them under the previous heading. International labour questions are dealt with by the International Labour Office, to which brief reference has already been made.

The problem of transit and communications has been the subject of a special Conference held at Barcelona, which resulted in the adoption of a Convention and Statute on freedom of transit, a Convention and Statute on the régime of navigable waterways, a series of recommendations relating to international railways and a resolution relating to ports subject to an international régime.

Representatives of forty-three States were present at this Conference, the object of which was to lay down the principles of a universal international law of communications and transit. It was arranged for future Conferences to take place at intervals under the auspices of the League, and a Special Advisory and Technical Commission on Transit, composed of sixteen members, was created. The members of this Commission are France, Italy, Great Britain and Japan (permanent), and Denmark, Poland,

Esthonia, Chile, Spain, Brazil, Uruguay, Belgium, Holland, China, Switzerland and Cuba (elected). The work of this Commission will be to examine the application of the principles laid down at Barcelona and smooth out any difficulties of application. The results of the Conference were embodied in a Final Act, which was signed on behalf of thirty-five States before the delegates left Barcelona.

The progress of the International Health Organisation has been somewhat slow owing to the desirability of incorporating the existing International Public Health Office, created in 1907, with the new organisation of the League. This is expected to take a considerable time owing to the necessity (for legal and diplomatic reasons) for obtaining the official consent of all the Powers who signed the Rome Convention of 1907. A difficulty has also been raised by the refusal of the United States to consent to the attachment to the League of Nations of any international organisation in which it takes part, for the United States is represented on the International Public Health Office. In view of the delay in setting up the International Health Office of the League, the Council of the League appointed a provisional Committee of five in January last to carry on the work, inviting at the same time the Committee of the International Public Health Office also to nominate five members. The International Public Health Committee declined the invitation. The League Provisional Committee met on May 5 and in view of the fact that, owing to the decision of the International Office, its composition was not such as had been intended by the Council of the League, voted itself unable to proceed with the programme of work, and applied to the Council to constitute a new Provisional Committee of Health and to approach the International Public Health Office once again with a view to obtaining its co-operation in a consultative capacity.

Mandates

Article 22 of the Covenant creates an entirely new form of Government, namely, that under a mandate. The idea of a mandate appears to have been taken from the Roman Law contract of that name, the whole essence of which was gratuitous service.

Simply expressed, a mandate is an authority to administer a piece of territory as a trustee accountable to the

League of Nations. Mandates are applicable to those territories

> "which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world."

That is to say, they apply to the former German and Turkish possessions. They are divided into three classes: "A" mandates, which apply to the former Turkish territories, such as Mesopotamia, Palestine and Syria; "B" mandates, which apply to the former German possessions in Equatorial Africa; and "C" mandates, which apply to German S.W. Africa and the former German possessions in the Pacific.

Mandates, however, are not conferred by the League, but by the Principal Allied and Associated Powers. The reason for this is that the territories to which mandates apply were ceded to the Allies by the Peace Treaties. The title of the Mandatory Power is therefore conferred by the Supreme Council, but the Mandatory is responsible to the League of Nations. This has led to complications, for the United States of America recently communicated with the Council of the League expressing a wish that the draft mandates drawn up by the Allied Powers should be sent to it before submission to the Council of the League, to enable it to state upon what principles its approval of the mandate was dependent. In particular the United States Government made reservations with regard to the "C" mandates (the terms of which had already been approved by the Council) and disputed the allocation of Yap to Japan. This had the effect of holding up the Council's approval of the "A" and "B" mandates, the consideration of which they postponed to enable the United States to appoint a representative to discuss the matter. But with regard to the "C" Mandates, the Council was compelled to point out that these had already been confirmed, and that, since the League was not concerned with the distribution of mandates, but only with the administration of the mandated territories, any dispute on the propriety of the distribution must be settled between the United States and the Supreme Council.

The "C" class mandatories are Australia (for German New Guinea), New Zealand (for Samoa), the British Empire (for the Island of Nauru), Japan (for the former German Pacific Islands

north of the equator, including the contested island of Yap), and South Africa (for German S.W. Africa). The "B" class mandates are shared between Great Britain (the greater part of German E. Africa and part of Togoland and the Cameroons), France (part of Togoland and the Cameroons), and Belgium (part of German E. Africa). The "A" class mandatories are Great Britain (Mesopotamia and Palestine), and France (Syria and the Lebanon). The draft Mandates for both the "A" and "B" class are again before the Council at its present (June) session.

It is the duty of the mandatory to render an annual report on its administration. The examination of these annual reports is one of the principal tasks of the Permanent Mandates Commission. The "C" class mandatories have been required by the Council to send in their first set of Reports; and the Council is considering whether it should not also call for reports on their administration from those states which, pending the confirmation of their mandates, are administering the territories in the "A" and "B" classes.

Miscellaneous

In addition to the major activities outlined above, the League has successfully carried out a large amount of business which, though of relatively less importance, has been, notwithstanding, of considerable international value. Thus steps have been taken to give effect to Article 24 of the Covenant and bring under the general supervision of the League all existing international bureaux. Effect has been given to Article 18 by the opening at the headquarters of the League of a Treaty Register and the issue of a special supplement of the Official Journal for the publication of treaties. More than one hundred of these treaties have already been registered, and fifty-two have already been published. Of these Germany, though not yet a member of the League, has submitted twelve, and the British Empire has submitted twenty-two.

At the first Assembly it was apparent that, in the opinion of many countries, the Covenant itself needed close scrutiny and possible amendment. The Assembly therefore directed the Council to appoint a Committee to consider the question and report through the Council to the Assembly. This Committee, under the chairmanship of Mr. Balfour, has recently been sitting

in London. A number of proposed amendments were considered and reported on, the most drastic proposals being those of Canada, whose representatives proposed the excision of Article 10, the famous "territorial guarantee" Article which aroused so much opposition in America in the autumn of 1919. In this case the Committee, on the proposal of the chairman, took the view that, since there had been so much public discussion on the subject of the Article in question, it would be well, before making any recommendation, to ascertain exactly what liability was imposed by it on the members. The Article was therefore sent for legal advice and interpretation to a special committee of jurists, who were directed to report on the subject in time for the Council to transmit the report, together with any observation it might wish to add, to the full Assembly of the League in September.

Whenever occasion has arisen, the League has always supported existing international organisations for furthering international co-operation. Thus it has been represented at the Conference of Red Cross Societies at Geneva; and has since communicated with the President of the International Red Cross Committee, assuring the Committee of its moral support in all steps it might be taking to remedy the evils resulting from the late war. It has also given its support to the International Organisation of Intellectual Labour; and it has taken a keen interest in, and given every encouragement to, the work of the Federation of Voluntary Societies for the League of Nations.

The writer is conscious that in this brief survey of the League he has done less than justice to the immense volume of work that is being accomplished. To describe its activities at all adequately would necessitate the compilation of a whole book. And the book would be out of date before it was published. One of the most encouraging facts about the League is its visible growth from day to day. As long as it continues to be so obviously alive there can be little danger of it falling into disuse or disrepute.

THE PROBLEMS OF AIR LAW

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Quain Professor of Comparative Law in the University of London.

THE navigation of air-spaces is still in the initial stage, though the necessities of the Great War gave a unique impetus to the pioneers. It is, however, recognised that the next world-war will be a chemists' war carried on in the air with the definite intention of striking irretrievable blows at the great economic centres of population. The result of such a war would probably be the destruction of civilisation as this generation understands that term. The world has been warned, and has now the choice of what might be international suicide or of such international co-operation as will open up new and almost undreamed-of possibilities, material and spiritual, for the human race. Aerial navigation will play a leading part in future developments, whether the world of nations chooses self-destruction or rehabilitation. Indeed the scientists and chemists are already preparing for either alternative.

Fortunately the lessons of the war have shown what the possibilities are in peace as well as in strife. If the nations decide to make war on a tremendous scale impossible, there is the immediate task of limiting the possibilities of aerial warfare. There is also the equally impressive task of organising aerial navigation for peaceful purposes. The two tasks are not independent, for it has always to be borne in mind that the conversion of aerial commercial fleets into deadly weapons of instantaneous war is a matter that has to be guarded against with meticulous care. Such conversion in the future will be comparatively simple, far simpler than the conversion of merchant ships into warships and far more effective.

It is plain, with such facts in mind, that the law of air-spaces is a far more complex matter than the law of land-spaces or of sea-spaces. While such law naturally finds the division into which all law falls, public law and private law, yet in the case of the law of air-spaces the interactions between the two branches,

though foreshadowed by sea-law, promise to be complicated to a degree not yet experienced in the jurisprudence of nations. It is worth while examining, in a broad way, this matter. The public and private law of air-spaces is as old, at any rate, as the Roman jurisprudence. I have elsewhere [1] arrived at the conclusion that in Roman law the air-space above Roman territory was the property of the State, subject to certain grants to individuals. In my view the Roman jurisprudence did not contain, and never recognised, the principle of the maxim *Cujus est solum, ejus est usque ad coelum*, which first appeared in England as a mediæval gloss in the latter part of the thirteenth century.[2] It is very doubtful if, even in English law, there is proprietary right in air-space *ad coelum*. Probably no action for trespass would to-day lie for interference with air-space above English land beyond a reasonable height above the actual air-space occupied by buildings.[3] The doctrine of eminent domain in Roman law and English law alike applies to air-spaces above the soil. It may be said without fear of contradiction that any independent sovereign State possesses full sovereignty, not merely eminent domain, in the air-space over its lands, and that such sovereignty is unrestricted by individual rights, whether proprietary rights or rights of travel.[4] There are, however, large ranges of air-space which are not superincumbent over territorial land or water. Professor H. D. Hazeltine, writing in 1911, declared [5] that "it is universally admitted that the air-space over the high seas and over unoccupied territory is absolutely free to all States and persons desiring to use it." That was ten years ago, at the opening of perhaps the most momentous decade in human history. The Great War has shown that non-territorial air-space, like sea-space, is liable in times of war to strategic control and effective occupation by the process of exclusion. That control was exercised above the North Sea, where it was occasionally broken down by sporadic raids of German airmen, above the Mediterranean Sea and above the Adriatic. The lesson of this is that in peace-time the use of non-territorial air-space can be regulated either by universal agreement or by the private agreement of the Powers who in fact control by

[1] *Proceedings of the Grotius Society* (1918), Vol. III. p. 61.
[2] See *Bury* v. *Pope* (1 Cro. Eliz., 118).
[3] See Sir F. Pollock, *The Law of Torts*, 11th ed. (1920), pp. 351–3.
[4] See Preamble to the Air Navigation Act, 1920.
[5] *The Law of the Air* (1911, London: Hodder & Stoughton), p. 9.

vicinity the space in question. Such control by agreement instantly brings into existence a private international law of air-spaces regulating the relations of nationals of different nations in so far as those relations are manifested in air-space traffic. On the effective regulation of that traffic the peace of the world depends. It is not merely a question of rules of navigation, or of the privilege of passing over territorial waters and lands; it is a question of intermingled private and public international relationship, which must be treated broadly in accordance with definite principles. Involved in the question are problems of private and criminal law, of the use of territorial air-spaces for purposes of escape, either by criminal or political refugees, problems of tariffs, and other questions of the highest scientific importance. It has to be remembered that air-space is the medium of communication by which wireless messages are sent. Sovereignty may be infringed by waves in the ether as much as by aeroplanes in the air. Full State sovereignty reserves to itself the right to forbid the use of the air-space above the national territory for any purpose whatever, for the conveyance of messages as well as the transport of men and of any sort of chattels. What principles are to be laid down? One thing at any rate is clear, that the air-space over the high seas is not absolutely free, since that space plays upon territorial air-space, and nothing must be done that will infringe upon territorial sovereignty without the consent of the sovereign. Yet so closely related are the nations of the world that there must be definite principles allowing the use of air-space even though it be territorial. In other words, there must be rules of an international character which *form a derogation of territorial* sovereignty by agreement, but *must never threaten the* existence of that sovereignty.

These rules must be based on: (1) national common and statutory (or municipal) law of air-spaces, private and public; (2) international statutory law (conventional and customary) of territorial air-spaces; (3) the international statutory law of non-territorial air-spaces. The sovereign rights of each State overrule all private rights, but those sovereign rights have to be co-ordinated, and so co-ordinated as to make it impossible for any State to abuse, either for civil or belligerent purposes, the rights of any other State. On the other hand, subject to the right of eminent domain in its various manifestations and

co-ordinations, the private rights of nationals in each State must also be co-ordinated so as to become a private common law for air-spaces for the whole world, referable, for the application of sanctions, to an International Court of Appeal from the domestic Courts. The principles involved seem clear, or almost clear, but in the working out of such principles endless complexities appear to arise of a far more difficult character, from the point of view of the jurist, than any that exist in current private international law.

It is important to see, in broad outline, how far at present international conventions have gone to secure a world-law of air-spaces. Ten years ago, in 1911, some of the difficulties and dangers were recognised in Great Britain, and the Aerial Navigation Acts of 1911 [1] and 1913 [2] were passed to prohibit the use of British air-space by foreign military or naval aircraft and to regulate the operations of commercial aircraft. In 1913 France and Germany had come to an agreement as to aircraft.[3] The legislative process went no further, but the years of war made it plain that the problem of acrial navigation had to be solved in an international fashion. Great Britain had begun to face the question before the war, and during the war had taken steps to control not only aircraft, but the use of territorial ether for the purpose of wireless communication. Within eleven weeks of the Armistice of November 11, 1918, further legislation was introduced, and under the Aerial Navigation Acts, 1911–19, a code of air-law was elaborated.[4] Mr. Ronald F. Roxburgh, in his invaluable new edition of the late Professor Oppenheim's well-known work on *International Law*, points out that—

"these rules supplied material for the Convention for the Regulation of Aerial Navigation [Cmd. 670], which was drawn up at the Peace Conference of 1919, and signed on October 13, 1919. The five Principal Allied and Associated Powers, and twenty-two other Allied Powers, were named as parties; but only fifteen of them signed it, namely, the British Empire, France, Italy, Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Panama, Poland, Portugal, Roumania, Siam and Uruguay. The convention applies to peace only, and does not affect the freedom of action of the parties in war, either as belligerents or neutrals (Article 38)." [5]

[1] 1 and 2 Geo. 5, c. 4. [2] 2 and 3 Geo. 5, c. 22.

[3] H. D. Hazeltine, "International Air Law in Time of Peace." (International Law Association: *Report of 29th Conference*, 1920. London: Sweet & Maxwell, p. 387.)

[4] *London Gazette*, April 30, 1919. The Air Navigation Act, 1920 (10 & 11 Geo. 5, c. 80), now enables effect to be given to the Paris Convention (see below) and makes further provision for the control and regulation of aviation.

[5] Oppenheim, *International Law*, Vol. I. (3rd ed., 1920. London: Longmans, Green & Co.), p. 354.

It is to be noted that only seven European powers have ratified the convention; that Japan and the United States of America are not parties to it; that, in fact, it does not meet the main dangers and difficulties which underlie that traffic in the skies which with the advances of science will multiply by geometrical progression. The principles of the convention must be noticed. The convention recognises: (1) complete and exclusive sovereignty in the air-space above national territory and territorial waters; (2) the peace-time right of innocent passage of private aircraft subject to regulations, except in certain reserved areas; (3) that aircraft must be registered only in the State of which their owners are nationals, and must bear evidence of this. The registers are to be transmitted periodically to an International Commission for Air Navigation, to be constituted under the direction of the League of Nations; (4) that private aircraft must follow prescribed routes across States other than that of their owner, and must land on order in obedience to a right of visit, and must not carry explosives or munitions and various other forbidden chattels; (5) that each State shall ensure the prosecution and punishment of all nationals contravening the rules of navigation; (6) that the International Commission is—

"to receive or make proposals for amending the convention, to amend the technical annexes, to carry out duties assigned to it by the convention, to collect and disseminate information bearing upon air navigation, to publish air maps, and to give an opinion on questions submitted to it for examination.... Disagreements as to the interpretation of the convention are to be referred to the Permanent Court of International Justice, and, pending its establishment, to arbitration. But disputes as to a regulation in any of the annexes are to be decided by the International Air Commission, acting by a majority."[1]

That is how the law of air-spaces now stands. It is clearly inchoate, it is by no means universal, it leaves to each State the business of protecting itself against potential enemies, and it does not meet or attempt to create a code of private international air-space law. On the other hand, it provides a fairly elastic machinery for developments (within somewhat narrow limits), and does something to create a Court of Air-Space of the same type as the Admiralty Courts. The convention is certainly not a thing to brush aside. It has large possibilities. It is a beginning, at any rate, which offers feasible and substantial developments.

[1] *Op. cit.*, pp. 358–9 (and see Arts. 34 and 37).

Yet as things stand, while the necessary *minutiae* of aerial navigation are receiving attention, while arterial trade air-space routes are in process of creation, and trade itself is looking to the heavens for great aerial developments, the weightier matters of the law have received little or no consideration.

I ventured to point out in November, 1917,[1] the difficult and urgent problems relating to the connection between what I may call Air-Space Power and the Control of Sea-Straits, and once again I am anxious to draw attention to the subject. International Commissions, armed with adequate air-space power, should control the Dardanelles, the Danube, the Baltic, the Scheldt, as well as certain determinate sea and river areas in the Near and Far East. Many possible sources of great international conflicts can be eliminated by air-space control. Arrangements limited to adjacent sovereign Powers are inadequate in a world likely to be ever more closely knit by aerial navigation and aerial messages. Certain problems of use are world problems, and are the reasonable subjects of decision by a body such as the existing or any future League of Nations, or whatever the combination may be called. The United States of America must be a party to any effective combination.

Another matter that has to be settled and has not been touched upon in any effective fashion is that of the conversion of peace-time aircraft into belligerent aircraft. No nation should be allowed to register for mercantile or peace-time use any craft that is capable of conversion into a war-machine. No doubt it will be a difficult matter to devise a form of aircraft incapable of substantial belligerent use but it is certainly not beyond the wit of the scientist, and probably the line of division between the war machine and the peace machine lies in the direction of fundamental differences of speed and climbing power. One test of peace-time aircraft would be a registered incapacity to attain a speed and a climbing power essential to war machines and inability to use the "silencers" which will make the war machine of the future so terrible. A fundamental differentiation, going to the very root of construction between the peace machine and the war machine, is an absolute necessity of the future, if sudden but perhaps long-premeditated wars are to be avoided. Another safeguard must be the registration of

[1] *The Journal of the Society of Comparative Legislation*, N.S. Vol. XVII., Part 3, p. 172.

all places of construction. All secret manufactories must be forbidden. In this dangerous game every nation must have its cards on the table under economic penalties that would not be impossible to devise. No doubt there are many difficulties in the way so long as any nation is not honest and is preparing for a day in which it hopes to secure the economic control of the world. No doubt it would be difficult to guard against secret places of construction; but fortunately the experience of 1914 is not likely to be forgotten; and preparations on a large scale for war, even in the secret construction of aircraft, are likely to be more difficult in the future than under the conditions of international and diplomatic life which existed up to 1914.

Meanwhile it is reasonable to press for the fundamental differentiation, as a matter of law, of peace aircraft from war aircraft, and also to insist upon the registration (with a right of inspection) of all places devoted, in whole or in part, to the construction of aircraft or parts of aircraft. If the illicit use of aircraft can be eliminated, all other problems relating to the law of air-space are comparatively easy of solution from the point of view of principles, though the working out of those principles, as applied by the statesman as well as by the municipal lawyer, will reveal complexities probably less easy of solution than have yet occurred even in the vexed history of land laws and sea laws. A beginning, however, has been made, and, since the economic needs of all nations are common needs, and since the economic world is becoming more closely knit every day by means of scientific discoveries, there is reason to hope that the common sense of an educated mankind will rise superior even to the ambitions of statesmen and the unwisdom of nations, and will find that in unity of purpose there is to be found for all a greater material and spiritual wealth than could be derived from the dominance of any particular people. In securing this necessary end a well-devised law of air-spaces, just and generous, but full of safeguards against evil designs, should play a notable and noble part.

NOTES

TRANSIT AND COMMUNICATIONS CONFERENCE AT BARCELONA

On March 10 the Transit and Communications Conference, which had been agreed upon by all the delegates at the meeting of the first Assembly of the League of Nations at Geneva, assembled at Barcelona. The Conference was held for the purpose of concluding a Convention which would comply with the provisions of Article 23 of the Covenant. This Article stipulates that "subject to and in accordance with the provisions of international Conventions existing or hereafter to be agreed upon, the Members of the League of Nations . . . will make provision to secure and maintain freedom of communications and of transit." The Conference was also charged, by the terms of the Geneva Resolution, with the task of establishing an "Advisory and Technical Committee," which would become a permanent organ of the League of Nations for advising on transit and communications questions.

The Barcelona Conference lasted until April 20, but within those six weeks it completed an immense quantity of work. It framed a set of rules for the organisation of General Conferences on Communications and Transit, and for the organisation of the Advisory and Technical Committee, and also elaborated a set of rules of procedure for such conferences. Two Conventions were drawn up and signed by many of the delegates. The first dealt with freedom of transit and the second with the régime of navigable waterways of international concern. In connection with the second Convention there was also an additional Protocol, under which the States whose representatives signed it agreed on condition of reciprocity to concede perfect equality of treatment to the flags of other States signatories to the Protocol as regards the transport of exports and imports (*a*) on all navigable waterways, or (*b*) on all naturally navigable waterways, *i. e.* on all internal waterways or on rivers. These were the great achievements of the Conference, but there were several minor instruments as well, namely, a declaration recognising the right to a flag of states having no sea-coast; a series of recommendations relative to the international régime of railways; a series of recommendations relative to ports placed under an international régime, and lastly a Final Act in which were included recommendations on a variety of points which had been dealt with in the course of the discussions.

The rapidity with which the Conference achieved agreement on these subjects was largely due to the careful preparatory work which had been done by a committee appointed several months before by the Council of the League to study the subjects for the Conference and to frame draft Conventions which could be the basis of its work. These recommendations had been circulated to the Governments in ample time before the meeting of the Conference, and the delegates of the forty States which attended the Conference were, therefore, able to come armed with full instructions.

The Conference was a striking illustration of the help which the League of Nations can render in the sphere of diplomatic conferences, as the League not only made all the arrangements for the Conference, but also provided the necessary secretariat.

CECIL J. B. HURST.

INTERNATIONAL CONFERENCE ON TRAFFIC IN WOMEN AND CHILDREN HELD AT THE SEAT OF THE LEAGUE OF NATIONS, GENEVA, ON JUNE 30 TO JULY 5, 1921

ON June 30 there met at Geneva the International Conference for the suppression of Traffic in Women and Children.

During this Conference, which was continued till July 5, seven plenary meetings were held, and although it was necessary to appoint commissions to discuss questions of detail, such as emigration, extradition, child traffic and other questions, the main work of the Conference was done before the eyes of the public.

Under the Covenant the League of Nations was charged with the responsibility of general supervision for the execution of agreements with regard to traffic in women and children. At a meeting of the Assembly of the League in December last, the following Resolution was adopted :—

> " The Secretariat of the League of Nations shall issue a questionnaire and the Assembly shall authorise the Secretariat to send this questionnaire to all Governments. The Governments shall be asked what legislative measures have been taken by them to combat the traffic, and especially what additional methods they are proposing to take in the future. . . . The Assembly shall request the Council to invite the countries signatory or adherent to the International Conventions of 1904 and 1910 to send representatives to an International Conference to be held before the next Assembly. This Conference would co-ordinate the replies to the questionnaire received by the Secretariat and would endeavour to secure a common understanding between the various Governments with a view to future united action."

The Council, in calling this Conference, decided to extend the invitation to any Governments willing to take part (whether members of the League or not).

Thirty-four countries were represented at the Conference and there were present forty-six delegates and technical advisers. M. Michel Léyie was in the chair, and Mlle. Forchhammer, the Danish delegate, was appointed Vice-President.

A large field of work was covered and a great deal of discussion took place. A general report, which was submitted by the French delegate to the Conference, was approved and annexed to the Final Act.

One fact which was strongly brought out by the report was that the existing arrangements of 1904 and 1910, ratified and adhered to by relatively few States, were not even by those States applied to their very fullest extent.

The Conference passed fifteen Resolutions, most of which were of a useful and practical character. The first dealt with the necessity for the universal

adoption of the agreement of 1904 and the Convention of 1910, and for the application to the fullest possible extent of the provisions of these arrangements. The principle of the application by all States of the existing Convention having been unanimously adopted, the attention of the Conference was drawn to those defects capable of remedy within the existing Conventions.

With regard to the Convention of 1910, Article 5, the Conference recommended that States should take all measures within their power to extradite or provide for the extradition of persons accused of or sentenced for offences under Articles 1 and 2 of the said Convention whenever extradition is not provided for by existing treaties. The Conference further considered Articles 1 and 2 of this Convention, and passed a Resolution to the effect that *not only the offence* included in these Articles, but also the *attempt to commit the offence* should be punishable. The Conference unanimously agreed that "the age of consent" should be raised to twenty-one, and expressed a wish that at some future date it might be possible to raise still further this age limit.

With regard to the agreement of 1904 the question of emigration and the control of employment agencies engaged in providing work abroad were much discussed by the Conference, recommendations being made both to Governments and to private associations dealing with the matter, it being recognised that co-operation between official and unofficial organisations was highly desirable in these as in other questions considered by the delegates. The Conference here clearly showed that whatever the forms it now gave to its Resolutions, it clearly contemplated in the immediate future the inclusion of these Resolutions in a Convention, for it definitely invited the International Commission of Emigration, constituted within the International Labour Office of the League of Nations, to continue the investigations by including on the Agenda of its coming meeting an investigation into those questions of emigration likely to affect the traffic in women and children, with a view to the framing of definite stipulations for insertion in an international agreement.

Undoubtedly one of the most important matters under consideration by the Conference was that of the appointment of a Committee to advise the Council of the League of Nations on all traffic questions. A definite recommendation was made to the Council that such a Committee, consisting of five or six representative States, as well as three to five assessors, chosen from international private organisations accustomed to deal with traffic questions, should be constituted with a view to advising the Council as "to the general supervision for the execution of agreements with regard to the traffic in women and children," and on all international questions relating to this matter which might be submitted to the Council for its consideration.

Moreover, a Sub-Committee was set up to discuss the question of child traffic and to consider in detail the various suggestions put forward by international and national private organisations. The various Resolutions and recommendations outlined above were embodied in the form of a Final Act.

The general opinion of the delegates appeared to be that the Conference had achieved much, and that if the recommendations of the Conference were speedily embodied in a Convention, the existing legislation for the controlling of the traffic would be very much strengthened.

RACHEL E. CROWDY
(General Secretary to the Conference).

THE CARRIAGE OF SICK AND WOUNDED SOLDIERS BY HOSPITAL SHIPS

In the reports in the Press of the trial and acquittal at Leipsic of Lieut.-Commander Karl Neumann for sinking the British hospital ship the *Dover Castle*, it was stated that the German Public Prosecutor gave it as his opinion that it was contrary to the terms of the Hague Conventions for the adaptation of the principles of the Geneva Convention to maritime warfare for hospital ships to carry soldiers who had become casualties in land warfare. Such a contention would, if accepted, strike at the root of these Conventions. The only German authority which to my knowledge lends any support to this view is a sentence of Dr. Hans Wehberg in his *Das Beuterrecht im Land und Seekriege*[1]:—

> "By hospital ships (*bâtiments hôpitaux*) are understood such vessels as are simply and solely built or arranged to carry succour to the wounded, the sick, and the shipwrecked. On a par with them are placed life-boats (*embarcations*), while, on the other hand, no corresponding immunity for transports that merely serve to convey the sick and wounded has yet been established."

The sentence is not free from ambiguity, but Dr. Schramm appears to understand it in the sense put upon the Convention by the Public Prosecutor before mentioned; his own construction of the Convention does not so limit it.[2] Bernstein is much more explicit, and clearly had in mind the Report of the Hague Commission of 1899, to which reference will be made later, for under the heading "Wounded, Sick and Shipwrecked," he expressly includes those belonging to the Navy or Army, wherever their wounds or sickness were contracted.[3]

The Tenth Hague Convention of 1907 was a revision of that of 1899, which had been rendered necessary by reason of the fact that in 1906 a new Geneva Convention had been entered into, making many necessary changes in that of 1864 governing the position of the sick and wounded in land warfare. The Convention of 1907 brought the terms of the Hague Convention of 1899 into harmony with the new Geneva Convention. Neither of the two Conventions expressly deals with the carriage by sea of soldiers who have become casualties in land warfare, but both contain references to them. Article 8 of the Convention of 1899 says: "Sailors and *soldiers* who are taken on board when sick or wounded, whatever their nationality, shall be protected and tended by the captors," and the corresponding Article of the Convention of 1907, Article 11, amplifies this by adding to the words "sailors and soldiers," the words, "and others persons officially attached to fleets and armies"; this addition was made on the proposition of the German delegation.[4] So also in the new Article of the Convention of 1907: "Each belligerent shall send, as early as possible,

[1] See translation by J. M. Robertson, *Capture in War on Land and Sea* (1911, London), p. 79.

[2] *Das Prisenrecht in seiner neusten Gestalt* (1913, Berlin), p. 141.

[3] Karl H. Bernstein, *Das Seekriegsrecht* (1911, Berlin), p. 207.

[4] *Deuxième Cónference Internationale de la Paix: Actes et Documents*, etc. (1909, The Hague), Vol. III, p. 685.

to the authorities of their country, Navy or *Army*, the military identification marks or tokens found on the dead and a list of the names of the sick and wounded collected (*recueillis*) by him " (Art. 17).

When the Commission was dealing with the whole matter at the Hague in 1899, the question of inserting words specifically to cover the carriage by sea of sick and wounded soldiers who had become casualties in land warfare was raised, and the following passage taken from the Report gives the reasons which led the Commission to refrain from any special reference to them :—

> " In the provisions submitted to the Committee by the Commission, we have spoken of wounded, sick and shipwrecked, not of the victims of maritime warfare. The latter expression though generally accurate would not always be so, and therefore should not appear. The rules set forth should be applied from the moment that there are wounded and sick on board sea-going vessels, it being immaterial where the wound was given or the sickness contracted, whether on land or at sea. Consequently, if a vessel's duty is to carry by sea the wounded or sick of land forces, this vessel and those sick and wounded come under the provisions of our project. On the other hand, it is clear that if sick or wounded sailors are disembarked and placed in an ambulance or a hospital, the Geneva Convention then applies to them in all respects.
> " As this observation seems to us to respond fully to the remarks made in the Sub-Commission on this point, we think it unnecessary to insert any provision dealing specially with it." [1]

The meaning of this is quite clear, but it would have been more satisfactory to have had the specific words which had been asked for.

A. PEARCE HIGGINS.

A NEW SCHOOL OF INTERNATIONAL LAW

THERE has recently been founded in Paris " L'École internationale de Droit international," under the patronage of L'Union juridique internationale, L'Académie des Sciences morales et politiques (de l'Institut de France), and the University of Paris (Faculté de Droit). Its founders and directors are all well-known international lawyers : Señor Alejandro Alvarez, Secretary-General of the American Institute of International Law, M. Paul Fauchille, founder of *La Révue générale de droit international public*, and M. Albert de Lapradelle, Professor of International Law in the University of Paris. M. Fauchille is the Secretary-General. The Honorary Committee contains the names of distinguished statesmen and publicists, European and American, including that of the Right Honourable A. J. Balfour.

The objects of the School are many and wide. It proposes to contribute to the reconstitution of international law in accordance with the new demands made on it under the altered circumstances of the world, to develop the

[1] *Parl. Papers*, Misc. No. 1 (1899), p. 74; also *The Reports of the Hague Conferences of* 1899 *and* 1907, edited for the Carnegie Endowment by Dr. James Brown Scott, 1920, p. 166.

influence of the ideas of justice and morality in the foundation of international law, to strengthen the bonds of union and friendship between the members of the family of nations, to extend the knowledge of the Law of Nations among the public, the press and the military classes, and to provide a centre of education for those who are preparing for certain careers, such as Diplomacy, the Consulate, the Bar, Commerce and Finance. The founders recognise that one of the functions of the School must consist in the education of public opinion in questions of foreign policy; they propose, therefore, to inaugurate popular course of lectures, in addition to the strictly scientific courses, wherein international questions of importance shall be discussed.

The first Term began on January 15, 1921, at the Faculté de Droit, 10, Place du Panthéon, Paris, and the programme is an attractive one. The lecturers included M. Léon Bourgeois, Professors Larnaude, A. Weiss, A. Pillet, A. de Lapradelle, Le Fur, A. Mercier (Lausanne), C. de Visscher (Ghent), MM. A. Alvarez, A. Mandelstam, Professors J. Blociszewski, Bourquin (Brussels), Captain Page, Professors Eisenmann and J. W. Garner (Illinois).

The boldness of this scheme calls forth the admiration, not, perhaps, unmixed with envy, of British students of international law. That it may have the success it deserves will certainly be their wish. It will be noticed that the School is to be both a special school for international law, and also an international school. One of the chief features, therefore, is the opportunity that is to be given to the students to hear from Professors of different countries expositions of international law as it is understood by them, thus bringing into relief the various divergencies of standpoint which different States have adopted on important international questions. The directors have already received promises of assistance from English, American, Swedish, Swiss, Dutch and Belgian Professors.

A. Pearce Higgins.

THE EDWARD FRY MEMORIAL LIBRARY OF INTERNATIONAL LAW

The Edward Fry Memorial Library of International Law, which is now set up at the London School of Economics and Political Science, where a separate room has been set apart for it, is freely accessible to all students on application to the Librarian. Among other purchases made by the Trustees is the unique collection of books on the subject belonging to the late Professor Oppenheim, as well as some valuable additions from the late Sir John Macdonell's library. Besides this the Library subscribes to most of the leading periodicals on international law. Various persons and public bodies have presented the Trustees with contributions in money and books, and the Carnegie Peace Foundation is giving its publications. The income at their disposal is not yet sufficient to enable the Trustees to publish a book catalogue, which would make the contents of this valuable library more widely known; they hope that before long they may be provided with funds for the purpose.

BELGIAN PRIZE COURT DECISIONS REGARDING GERMAN SHIPS INTERNED IN DUTCH PORTS

By Professor A. Pearce Higgins, C.B.E., LL.D.

I

La Revue de droit International, which has renewed its youth under the able editorship of Professor Charles de Visscher, contains in the second number of the volume for 1920 reports of several decisions of the Belgian Prize Courts delivered in November, 1919 (pp. 271–292), and a Note by the Editor in which he supports the findings of the Court (pp. 228–238). The circumstances disclosed by these judgments are probably unparalleled in their complexity, and the questions raised are of great interest to students of international law. Only some of them, however, can be dealt with in this Note. The Belgian Court condemned a number of German ships which were in Antwerp at the outbreak of the late war but escaped to Dutch waters before the Armistice. The validity of these judgments was disputed by the Allied Governments, but a compromise was ultimately reached at Spa, in July, 1920, whereby Belgium, while maintaining the finding of the Prize Court, agreed, in consideration of certain tonnage being transferred to her, not to claim any interest in the vessels by reason of their condemnation. In consideration of this waiver she received, after the final allotment of tonnage made by the Reparation Commission, a transference to her, out of the shares of the other Powers who participated in the division of the enemy tonnage under the Treaties of Versailles, Saint-Germain and Trianon, a tonnage of a total equivalent to the tonnage of the vessels condemned, and of the same type, age and value. Had the Allied Powers good reasons for disputing the findings of the Belgian Prize Court? It will first be necessary to examine the facts and then to consider the law.

II

At the moment when Germany invaded Belgium there were in the Port of Antwerp thirty-seven German and two Austrian merchant ships, with a total tonnage of 180,000. Some days afterwards these ships were seized by the Belgian authorities, and a Prize Court was set up in Antwerp to adjudicate on the seizure. Proceedings were taken in the case of the *Gneisenau*, and a preliminary judgment was delivered; then came the occupation of Antwerp by the Germans, and further proceedings were impossible while it lasted; the Germans obtained possession of the ships.

Before the German occupation of Antwerp correspondence took place between the British and Netherlands Governments regarding a proposal of the former to remove the ships to England with British crews. The Dutch Government refused leave for their passage down the Scheldt on the ground that it would be contrary to the neutrality of Holland to allow the passage of private property taken as an act of war, and they stated that if the ships entered Dutch territory they would be interned or given an opportunity to return to Antwerp. They claimed that the portion of the Scheldt in Dutch territory was not to be treated as territorial waters, but as territory; that the passage of these vessels did not come within the meaning of the term "free navigation" provided for by treaty in the matter of commerce; neither did they admit that their attitude was

based on the analogy of war vessels which remained in a neutral port beyond the period authorised.[1]

Correspondence also subsequently took place between the Belgian and Dutch Governments, in which the latter justified their attitude on the ground of the fact that the vessels in question were in an indeterminate legal position by reason of their having been in an enemy port at the outbreak of war, and by reason of the ambiguities of the Sixth Hague Convention, 1907, on the subject. They contended that a neutral would have to retain them as being in the same position until the end of the war; they further stated that they would apply the same rule if the Germans attempted to send them into Dutch waters.[2]

In October, 1918, in reply to a communication from the Belgian Government, the Dutch Government undertook as regards the Belgian Government, "à remettre les navires à celle des puissances belligérentes qui serait désignée soit par un accord à intervenir entre elles, soit par une décision entourée de toutes les garanties d'impartialité," if any of the ships were interned.

On November 5, 1918, the Belgian Government warned the Dutch Government of the possibility that the Germans would attempt to send the vessels down the Scheldt, and recalled the attention of the Dutch Government to their own undertaking above mentioned. At the same time they reserved their claim to exercise over the ships all the rights which would have belonged to them had the vessels remained at Antwerp. Shortly afterwards, but before the signing of the Armistice of November 11, the Germans sent all the ships down the Scheldt, and they were interned by the Dutch authorities. M. de Visscher notes that it was to thwart this action, or at least to provide against its consequences, that the Allies inserted in the Armistice clauses requiring the Germans to leave in position and intact all ships on evacuating Belgian ports (Article 27), and forbidding the transfer to neutral flags of German ships after the signature of the Armistice (Article 33). However this may be, as a fact, the ships were in Dutch ports at the date of the signing of the Armistice. The Interallied Maritime Transport Commission entrusted the German ships to some of the Allied Governments for the purpose of re-victualling Europe. Belgium requested Holland to return the ships to her, but the latter Power agreed with Great Britain to place all vessels above 1600 tons at her disposal for the purposes of the Interallied Commission, and most of the remainder remained in Holland pending an agreement between the Allies. During the months of November and December the Belgian Prize Court proceeded to the condemnation of the ships.[3]

III

1. Leaving out of account all questions connected with the attitude taken up by Holland in refusing passage to the ships, and the validity in international law of her Neutrality Regulations, we proceed to consider the position taken up by the Belgian Prize Court. The views were developed chiefly in two judgments in the cases of (1) the *Elbing*, *Hanau* and *Tasmania*,[4] and (2) the *Atto* and

[1] *Parl. Papers*, Misc. No. 12 (1918), Part II, Nos. 1–8.

[2] *Livre Orange*, 1918, p. 34.

[3] The *Zora*, an Austrian ship recaptured by the Germans at Antwerp, was in the hands of Belgium under an arrangement with the Allied Powers at the time of the Prize Court decisions, but the Court stated that this fact was of no importance as regards the position which it assumed in relation to the question of possession.

[4] Reported on p. 183 *infra*.

Ganelon[1] (the latter is not reported in *La Revue de droit International*). The owners were represented in both cases; in the latter the claimant was the sequestrator of a German firm in Antwerp who were agents for the owners, the Roland Line of Bremen. His intervention was rejected, on the ground that the law relating to sequestration only applied to property in Belgium, and the ships were at the time in a Dutch port; this fact did not, however, prevent the Court from condemning them.

2. The owners of the *Elbing* contended that the Court could not proceed to condemnation without possession of the ships. To this the Court replied that physical detention was not necessary. It distinguished between legal possession and physical detention, and held that the Belgian State had the former, citing Article 23 of the Thirteenth Hague Convention, 1907, which provided that a prize can be taken into a neutral port to await adjudication. To this view it is submitted that the reply is, that when a possessor is deprived against his will of physical possession by another who has control of the *corpus* with the *animus rem sibi habendi*, he loses possession, and with it all his possessory remedies. This was what happened when the Germans captured Antwerp and their ships. Further, the reference by Professor De Visscher to the English case of the *Polka*[2] does not appear to be apposite, since the Russian vessels which were captured in the port of Libau were taken to the Prussian port of Memel by the captors, and the Prussian Government consented to the procedure. They were condemned under the special circumstances, and Dr. Lushington expressly stated that the case was not to be considered as a precedent for condemnation of a prize while brought into a neutral port. Moreover, Holland did not adopt Article 23 of the Hague Convention in her Neutrality Regulations; and a more important point is that the ships were not taken into Dutch waters by the Belgians to await adjudication, they were removed there by the Germans in whose control they were.

3. It is further contended by the Belgian Court that the recapture by the Germans was incomplete, because of the prohibition which Holland placed on their movement. The same reasoning might be applied to their original capture by the Belgians. It is submitted that the Dutch prohibition of movement had the effect of converting the Belgian portion of the Scheldt into the position of inland waters, such as the American Great Lakes or the Great African Lakes, on which the right of capture can be exercised.[3] It appears that both the original capture and the recapture were valid exercise of the right of prize.

4. It is suggested by the Belgian Court that the removal of the ships by the Germans before the signature of the Armistice of November 11, 1918, was a violation of its terms. It is, however, recognised that it is the duty of a military commander to do all in his power to prevent arms and other valuable property from falling into the hands of the enemy.

5. Whether the vessels would have been liable to condemnation had they remained in the Belgian port, raises the question of the applicability of the Sixth Hague Convention, 1907; but if the opinion before expressed, that the Belgian Court had not jurisdiction, be correct, the question does not arise.

6. The complication caused by the action of Holland is a matter which does

[1] Reported on p. 190 *infra*.

[2] Spinks, 57.

[3] *In re Craft captured on Victoria Nyanza*, 3 B. & C.P.C., p. 295.

not now come into consideration, but the view of the Belgian Court, that the appropriate method by which the Dutch Regulations should have been enforced, assuming them to be in conformity with international law, was by expulsion of the ships into Belgian waters, is one for which there appears to be support. It would, of course, have been equally applicable to Belgium if the latter Government had attempted to send the vessels into Dutch waters on the eve of the capture of Antwerp.

IV

On the general principles of the law of prize it is submitted that the Allied Powers had good grounds for questioning the judgments of the Belgian Court. They are based on a fiction of continued possession, but prize law is essentially a law which deals with facts, not fictions. A captor either has or has not control over his prize. If he has possession he may in certain cases destroy it; with permission of a neutral Power he may take it into his port for sequestration pending a decision of his Prize Court, but it is believed that there is no precedent for a Prize Court proceeding to judgment when the prize has been recaptured, even though the recaptor has lost possession by internment in a neutral port. Professor De Visscher cites the case of the *Appam*, which was condemned by the Hamburg Prize Court while lying in Newport News; but the position there is distinguishable from the present cases. The Germans alleged, and possibly believed, that they had the right to take their captures into American ports for sequestration under the Treaty of 1799. Furthermore it is certainly open to question whether the judgment of the Hamburg Prize Court was good law. Would a Dutch Court have awarded possession to the Belgian State if proceedings had been taken in Holland against these vessels?

BELGIAN PRIZE COURT

s.s. *Elbing*, *Hanau* and *Tasmania*

Antwerp, November 7, 1919

PUBLIC sitting of the Belgian Prize Court, held at Antwerp, on Friday, November 7, 1919, at 10 a.m.

Present: Messrs. Hodum, G.A.L.A., vice-president, replacing Mr. Maffei, president, unable to be present; van de Kerckhove, master for deep-sea voyages, and Lejeune, underwriter, of Antwerp, full members; De Vos, deputy Government Commissioner; Verhees, secretary-registrar.

In cases No. 9, s.s. *Elbing*, No. 15, s.s. *Hanau* and No. 29, s.s. *Tasmania*, the Court gave the following decision :—

Having noted the petitions presented by the Government Commissioner for the condemnation as good prize to the Belgian State of the steamers *Elbing* of 4,884 tons, *Hanau* of 4,213 tons, and *Tasmania* of 7,480 tons, formerly belonging to the German Australian Shipping Company, whose headquarters are at Hamburg;

Having noted the other documents put in during the arguments;

After hearing the several conclusions of the Government Commissioner Van Gindertaelen, and also of the said Company represented by Messrs. Isidore Van Doosselaere and Georges Van Bladel, advocates of Antwerp;

Seeing that the cases are connected, and there is good reason to consolidate them;

I. The German Australian Company contends, firstly, that the petitions for condemnation as prize are not well founded. When a captor has lost possession of the vessel captured, he cannot take proceedings for the regularisation of the capture; the steamers in question after being seized by the Belgian military authorities on August 6, 1914, were recaptured by the occupying Power on the fall of Antwerp (October 9, 1914) and sent to Holland before the Armistice: since that date they have been transferred by Holland to England and, in agreement with the Allies, handed over by her to be operated by the Food Administration in the United States;

It is, however, necessary to distinguish between the possession of the vessels and their physical custody; in general actual custody of the vessel is not an essential condition of its condemnation as prize; it is sufficient that the vessel should definitely be, or be deemed to be, legally in the possession of the captor to the exclusion of the enemy belligerent. Article 23 of Convention XIII. of the Hague contains moreover an application of this principle in laying down that a prize may be taken to and remain in a neutral port while awaiting the decision of a prize court.

In reality everything depends on the circumstances in which the steamers which are the subject of these proceedings were first captured and then recaptured and subsequently interned in Holland during the course of the war.

These vessels, with 35 other enemy vessels, were seized by the Belgian authorities in the month of August, 1914, in a Belgian port where they were thought to be in a place of safety: the Dutch Government having objected to the vessels passing down the Scheldt they ought not the less to remain in Belgian hands at the end of the war, unless the fortune of war or the Treaty of Peace should decide otherwise.

The Belgian capture was characterised from the moment it took place by possession complete in all respects, presenting all the indications of permanence and requiring for its complete and definite annulment a recapture effected by the occupying Power; this alone could deprive the Belgian State of the advantages of the situation. The situation was quite special and had nothing in common with that which frequently arose in the old privateering days when a vessel recaptured even in the same engagement was almost certainly a ship saved from the hands of the enemy, and passed so to speak irrevocably into the hands of the recaptor.

The recapture of the ships seized at Antwerp possessed no clear and definite validity for Germany and her nationals unless she could pass the ships into Holland free of all conditions, or unless the fortune of war intervened to assure her the possession of them.

To all the German requests for the free passage of the vessels by the Scheldt the Netherlands Government always replied, as it did to the Belgian Government in 1914, that passage was refused under penalty of sequestration.

The Dutch attitude was based on the fact that the lower part of the Scheldt being claimed to be Dutch territory, and the vessels in question having been

the subject of a belligerent act of war or constraint, the Dutch Government could not allow the continuation of such acts upon its territory without infringing the rules of strict neutrality.

A reserve must certainly be made as to the validity of, and as to the arguments invoked in favour of, the theory advanced by the Netherlands Government, a theory by which Belgium was the first to suffer: it is inconceivable that one should be able to refuse to treat as "prizes" enemy ships seized by the Belgian authorities at the outbreak of war and for which a prize court had been established with the intention on the part of the Government that they might be condemned as prize, or that one should be allowed to refuse to apply to these prizes the system laid down in Article 23 referred to above of Convention No. XIII. of The Hague, which authorises the stay of prizes in a neutral port while awaiting the decision of a competent prize court, and does not prohibit the passage en route of territorial waters. Furthermore, it was not for the Netherlands Government to concern itself with the way in which the Belgian prize court, which alone had jurisdiction, dealt, in the case of the *Gneisenau*, with the question of the liability to condemnation of vessels in the port of Antwerp at the beginning of the war. In reproducing only partially the rules laid down in Convention XIII. and suppressing the exception as to prizes awaiting a judicial decision, the Dutch proclamation of neutrality seems to have been conceived in a spirit other than that of the Convention of The Hague, and to have exaggerated in an arbitrary manner the idea of the obligations of neutrality.

On the other hand, the Netherlands Government after prohibiting the passage across Dutch territory of anything which constituted booty of war or had been requisitioned by a belligerent, thought that it could assimilate thereto the passage of vessels which had not yet acquired any such character, and of which the Convention of The Hague in no way forbad the passage through neutral territory, such territory being closed only to belligerent troops and warships.

But however erroneous the ideas of the Netherlands Government may be as to the obligations of neutrality, one must certainly recognise that they were entitled to impose those ideas on the two belligerents impartially and that Germany, who in this respect had no better rights than Belgium, was in consequence obliged to respect the Dutch prohibition on pain of seeing any infringement of this prohibition treated as null and void in law.

The vessels subject to these proceedings were in fact bottled up in the port of Antwerp, and in the ordinary course, if Germany had conformed to her international obligations, there they ought to have remained until the liberation of the country, their legal situation being that of possession more or less, and the recapture being doubtful in character and one which would not destroy the effects of the original Belgian capture.

Consequently, the fact of Germany's having in 1917 and in October, 1918, violated Dutch neutrality in sending these vessels into that territory with the manifest intention of enabling them to avoid certain recapture by the Allied forces cannot confer upon her any legal right, nor prevent the legal status of these vessels being decided under the same conditions as would have existed if after the German retreat the vessels had been at Antwerp and had been subjected physically to recapture by the Belgian authorities and to the consequential possession which recapture should entail.

Yet again, if it is true that the Netherlands Government considered that

the position of the vessels in law was indeterminate, and believed that it ought to intern them as a penalty for breach of the prohibition on passage, so as to leave their position in law undefined until the end of the war, it does not follow that this undefined position ought not to come to an end legally and, subject only to the condemnation as prize, from the moment that the fortune of war allowed the definitive retaking of the port of Antwerp and the recapture of the vessels which in law should not have been able to leave it and pass into Holland.

One may with justice ask whether, instead of limiting itself to measures of internment, and arrogating to itself a power to take the final decision, which did not belong to it, the Netherlands Government was not rather under an obligation in accordance with the rules of international law and by analogy with the principles laid down in Convention XIII. of The Hague, to expel from its territory forthwith and send back to Antwerp the vessels which had contravened its prohibition: the refusal of permission to pass, being considered by that Government at once as a right and an obligation, logically called for the employment of means to ensure respect for its rights and compliance with the obligation. A formal prohibition of the right of passage, if interpreted otherwise, was equivalent to a mere permit to pass subject to sequestration, and lost all reality.

But in any case a penalty applied in this way to the vessels by the Netherlands Government could have no influence on the right to bring them before a Belgian prize court, and upon their legal situation; such situation being determined by the nature of the obligation which has been illegally broken and by the consequences of its presumed fulfilment.

It follows from these considerations that the s.s. *Elbing*, *Hanau* and *Tasmania* must be deemed to have been in Belgian waters at the moment of the German retreat and of the evacuation by the enemy of the port of Antwerp, and, therefore, to have been the subject on the part of the Belgian authorities of an actual physical recapture permitting, on the ground of the former seizure in 1914, the initiation of proceedings for the condemnation of these vessels as prize.

Moreover the provisions of the Armistice obliged the enemy to leave *in situ* all his material and particularly his ships; these provisions, as well as the Treaty of Peace which signalised the defeat of Germany, only marked the fulfilment for the benefit of Belgium of the condition which had suspended the complete exercise of its rights of possession acquired and held since 1914.

It is clearly immaterial that since the time when legally the vessels should have been recaptured by the Belgian State delivery of them should as a matter of fact have been made by Holland to the Inter-allied Transport Council, this circumstance not being one which could modify the legal situation which the Belgian State was entitled to uphold against all comers;

II. As to the validity of the petitions

(*a*) According to Article I. of the Convention of The Hague of October 18, 1907, approved by the law of May 25, 1910, it is desirable that an enemy vessel in an enemy port at the outbreak of hostilities should be allowed to depart freely or after a sufficient number of days of grace and after being provided with a pass to reach its port of destination or such other port as may be indicated.

While the court does not think it necessary to decide in the present case whether Germany and German nationals are entitled in the circumstances of the last war to claim the benefits of the Convention of The Hague, the discussions preceding the 1907 Convention show that while maintaining the optional

character of days of grace, so as not to allow the departure of enemy vessels which might be utilised for offensive or defensive military purposes, and in general so as to preserve essential belligerent military interests, it was intended to give binding form to a rule already universally admitted in maritime international law under which, subject to certain overriding considerations, the right to depart forthwith or within a sufficient period must be allowed to enemy merchant vessels.

Article 2 of the Convention of 1907 embodies the penalty attached to this rule in providing that if sufficient days of grace are not accorded to an enemy vessel, she may not be condemned, but may only be detained without compensation or requisitioned on payment of compensation.

But it would be entirely contrary to the texts referred to above to infer that in no case can enemy merchant vessels be confiscated at the outbreak of hostilities. The right to capture enemy private property at sea remains the rule, and the intention was only to introduce an alleviation therein in favour of vessels in one or other of the exceptional categories referred to in the provision,—viz. where no days of grace are allowed, or where *force majeure* prevents departure—; the exceptions must, therefore, be interpreted strictly. Yet again, a master who refuses to leave the enemy port within the days of grace accorded to him is deemed not to be acting in good faith; and failure to comply with the obligation imposed by an international Convention necessarily deprives him of the benefits of a stipulation which was introduced precisely for the protection only of operations at sea undertaken or carried on in good faith at the beginning of a war. Furthermore, a belligerent in whose ports there are enemy vessels, so that he is bound to allow them to depart freely, is not presumed to waive the right to capture on the High Seas vessels which refuse to avail themselves of this facility, any more than he renounces it in favour of vessels which do depart, nor to renounce the opportunity to weaken by such capture the power of his adversary by a mode of warfare which remains lawful in international law, while at the same time augmenting his own maritime resources;

It does not appear, either from the text of the Articles cited above or from the preliminary discussions, that a belligerent is bound to announce either by a notice, an order or any publication whatever that he intends to allow departure immediately or within a prescribed period; this concession may be indicated sufficiently by the fact that the belligerent has allowed several days to elapse without hindering the departure of the vessels. The Convention of The Hague does not at all imply that general and uniform days of grace should be allowed to vessels. On the contrary, one must admit that it is for the military and naval authorities to act in this respect according to circumstances, and that it is permissible for them, if they think expedient, to determine in each particular case what days of grace should be granted; whence it follows that no case is made out for the necessity of notifying a fixed number of days of grace It is for the vessels themselves to show the required diligence to obtain a safe conduct and to benefit by the days of grace which are given in fact and not to allow themselves to be overtaken by events.

The facts are a state of war between Belgium and Germany dated from August 3, 1914, at 7 a.m., the German ultimatum having expired at that hour; the declaration followed next day, August 4, at 10 a.m. It is quite untrue that from that moment the Belgian pilotage organisation was no longer willing to provide

pilots for German vessels. Even if the allegation were true, the vessels could ask for Dutch pilots. The truth is that the military authorities of Antwerp limited themselves to prohibiting the departure of vessels loaded with cereals, barley and foodstuffs, without distinction of nationality, and to imposing on all vessels departing, over and above the regular orders for escort, a local authorisation transmitted by the maritime commissioner. If at one moment on August 4, 1914, an order was given by General Dufour to move the German vessels alongside the quay out into the basins for fear that their crews might attempt to block the port, such order received no publicity and was withdrawn and treated as null and void. It is established that it was the officers in charge of the German vessels themselves who, on their own initiative and without being aware of the verbal order in question, for the most part shifted their vessels into the basins, and that on August 2. The prize court enquiries in 1914 in the case of the s.s. *Gneisenau*, on which the Australian Company relied, particularly the disposition of the maritime commissioner Cuvelier, show that it was the idea of all the Belgian military and naval authorities to allow the Germans sufficient time to leave the port, and that the maritime commissioner had a free hand to determine the time to be given to each ship for this purpose. It was not until 5 p.m. on August 6 that the enemy vessels were seized by the Belgian authorities, the maritime commissioner going on board at that time to notify the capture of the vessels; whence it follows that these vessels were allowed a period of nearly four, or at least nearly three, days to leave the port of Antwerp and reach their port of destination or some other specified port.

This period must be reckoned as amply sufficient, especially when regard is had to the position of military inferiority which Belgium occupied as regards Germany, and to the brutal aggression of which she was the victim.

No breach of Article 1 of the Convention of The Hague of 1907 was, therefore, committed by the Belgian authorities, and the sanction, the non-liability of the vessels to condemnation, is not applicable.

What is more, Germany herself defaulted in the observation of the aforementioned provisions; she allowed no days of grace to enemy vessels in her ports and seized them at once, including four Belgian vessels. Such an attitude on the part of a Power which at the Conference of The Hague was in favour of the days of grace being strictly obligatory would justify Belgium, if not in withdrawing from the fulfilment of her obligation as to the non-liability of the vessels to condemnation, at any rate in adopting a strict attitude as to the condition and number of the days of grace to be granted.

(*b*) The German mobilisation orders, which were common knowledge by Sunday, August 2, do not constitute a circumstance of *force majeure* which could prevent the vessels leaving the port of Antwerp. The owners cannot rely upon them as a justification for failing to comply with an obligation imposed by international law. In the event of no sufficient number of sailors remaining on board, the masters were at liberty—and the investigations in the case of the *Gneisenau* have shown that it was possible to do so—to embark foreign sailors, such as Scandinavians, or, if necessary, to have their ships towed to Flushing or Hansweert, where they would provisionally have been in a place of safety. Furthermore, the crews of enemy vessels were not expelled until August 6, the date of the Belgian seizure. To allow the vessels to leave the port for one or other of the destinations mentioned above, an average of ten or fifteen men

on board each vessel, even those of the largest tonnage, would be sufficient, whether the vessel were towed or not; as it is admitted that about 200 German sailors remained on board, about 250 more members of the crew would be required for manœuvring the 38 vessels, and these together with a sufficient number of tugs might have been found without difficulty, either on the spot at Antwerp, or at the port of Rotterdam, whence they could come in three or four tides.

The result is that no circumstance of *force majeure* can have prevented the departure of the enemy vessels within the period of grace allowed them.

Far more, it is established that the masters of the vessels made not the slightest attempt to leave the port; they made no application to the maritime commissioner for this purpose; they asked for no safe-conduct; and they proved by their conduct that far from wishing to quit the port, they held to remaining there under orders. In no other way can the haste be explained in which a number of them moved their vessels into the basins a little before or after the declaration of war, when the operation of getting into the basins of the port of Antwerp was more complicated and more dangerous than a voyage to Flushing or to Hansweert would have been. Moreover, the Court's information shows that the German ship *Maine*, not destined for the port of Antwerp, and flying not the ordinary flag, but a special flag, attempted to enter the port on August 4, coming from Flushing, and the master and officers asked to be interned at Antwerp, saying they belonged to the naval forces; the *Schildsturm*, which left Antwerp, shed 18, on July 31, after passing Hansweert returned to Antwerp the same day and went straight into the basins; manœuvres so unusual are scarcely intelligible unless orders had been given by the shipowners with a view to the war and to the employment of the vessels by the German military authorities after the expected rapid fall of Antwerp. These movements formed part of a whole scheme which comprised all the vessels of enemy nationality and in which each of them played its allotted part; the pretext that their agents had no orders is clearly inadmissible.

It follows from all the above that neither of the two narrowly defined cases in which the Convention of The Hague forbids the condemnation of the vessels arises.

The order issued by General Dufour on August 11, 1914, did not in any way recognise that the enemy vessels could only be subjected to detention without compensation or to requisition on payment of compensation. The purpose of the order was the setting up of a commission to take the necessary steps as to the contents of the vessels and it did no more than establish that at that moment the vessels were merely detained and might be requisitioned on payment of compensation.

Such an attitude did not compromise the future nor did it imply an admission that Article 1 of the Convention of 1907 had not been complied with and that the vessels were not liable to condemnation as provided for in Article 2.

Furthermore, the order of General Dufour of August 17, establishing the prize court and enacting that it should have power to decree condemnation, detention, or restitution, with or without compensation, refers specifically to the previous order of August 11, and the former, therefore, cannot have been in contradiction with the latter.

The prize court must now do in respect of these captured vessels what in

all verity the tribunal set up in 1914 might have done, *i. e.* decree the condemnation of these vessels of enemy nationality, which had the benefit of the days of grace during which they might have departed freely and which without being subject in any way to *force majeure* allowed those days to elapse by their own fault :—

For these reasons :

The Court, after hearing the Government Commissioner Van Gindertaelen, whose conclusions were in accordance therewith, rejecting all contrary conclusions as erroneous, and all tenders of evidence as inadmissible, and consolidating the cases, takes note of the fact that the Australian Company assesses the value of the subject matter of the proceedings at four million francs for each vessel, declares the steamers *Elbing*, *Hanau* and *Tasmania* good prize and adjudges that the vessels belong in their entirety to the Belgian State; costs to follow the event.

G. Hodum.
Ph. Verhees.

BELGIAN PRIZE COURT

s.s. *Atto* and *Ganelon*

Antwerp, November 11, 1919

Public sitting of the Belgian Prize Court, held at Antwerp on Tuesday, November 11, 1919, at 9 a.m.

Present : Messrs. Maffei, H.M.J., Antwerp, president; Lejeune, underwriter at Antwerp, acting member; Van Rysselberghe, of Antwerp, master for deep sea voyages, deputy member, replacing Mr. Van de Kerckhove, full member, unable to be present ; Van Gindertaelen, Government Commissioner ; and Verhees, secretary-registrar.

In cases No. 3, s.s. *Atto* and No. 13, s.s. *Ganelon*, the Court gave the following decision :—

Having noted the petitions initiating the proceedings presented by the Government Commissioner for the condemnation as good prize to the Belgian State of the steamers *Atto* and *Ganelon* formerly belonging to the Roland Line, whose headquarters are at Bremen.

Having noted the petitions for liberty to intervene presented by Me. Boon, barrister, of Antwerp, in the capacity of sequestrator of von Bary & Co., agents of the said Roland Line.

Having noted the other documents put in during the hearing.

Having heard the arguments and conclusions of the Government Commissioner, van Gindertaelen, and the said Me. Boon;

Whereas the cases are connected, and there is good reason to consolidate them;

I. *On the Admissibility of the Intervention ;*

The law of November 10, 1918, as to the sequestration of property and interests of enemy subjects only applies to such property and interests in Belgium; this is clearly shown not only by the text of the law (Articles 2, 4 and 11) but

also by the Report to the King which precedes it (Decision of the Belgian Prize Court, October 28, 1919, s.s. *Wartburg & Co.*);

The steamers *Atto* and *Ganelon* are now in a Dutch port, and therefore neither the text nor the spirit of the said law brings them within the category of property which can be sequestrated, and consequently the intervener has no interest in the case and no title to intervene.

II. *On the Merit;*

The steamers *Atto* and *Ganelon*, flying the German flag, remained in the port of Antwerp after the outbreak of hostilities and were there captured under the orders of the military governor of the fortress; on the capture of the city they fell into the hands of the German authorities, and just before the Armistice were taken by the latter into Holland, where they were interned by the Netherlands Government.

The right of capture remains in its entirety one of the basic rights of maritime war, and the only restrictions upon the full measure of this principle are those laid down in the Conventions of The Hague, Nos. VI and XI.

Neither of these Conventions draws any distinction between vessels on the high seas and those in port at the outbreak of hostilities; on the contrary Article 2 of Convention VI renders immune from the law of prize only vessels prevented by *force majeure* from leaving the enemy port during the days of grace accorded to them, and those which are not allowed to depart: consequently, the right of capture has been preserved in respect of all other vessels.

Though it is desirable that belligerents should announce the period within which enemy ships are to quit the ports under pain of capture, no formal obligation to do so exists; and it is for the courts which are called on to decide on the validity of a capture to determine according to the special circumstances of each case whether the time which elapsed between the outbreak of hostilities and the capture was sufficient to enable the vessel to depart and reach a place of safety.

The capture of the s.s. *Atto* and *Ganelon* was notified on August 6, towards evening, whereas hostilities had broken out in any case through the declaration of war which was notified during the morning of August 4, and this period appears sufficient to allow the vessels to reach Dutch waters;

Even if it were proved that the German mobilization on August 2 had deprived these vessels of a part of their crews, the fact would be immaterial, as it is well known that the masters could easily have filled up their crews by enrolling neutral sailors whom events had made available in sufficient numbers both at Antwerp itself and in the neighbouring Dutch ports; in any case the masters could have got their vessels towed; no evidence in the case, however, indicates that any attempt was made to resort to either of these methods.

If it is borne in mind that not one of the thirty-seven enemy vessels at Antwerp at the time of the declaration of war made any attempt whatever to leave the port, or to obtain days of grace for this purpose, and that a part of the cargo of the *Totmes* was contraband of war of a kind suitable for the defence of a fortified place, and also included explosives, it is evident that all the vessels remained because they had instructions to remain and await events;

The capture of the s.s. *Atto* and *Ganelon* was followed by effective possession being taken of them by the Belgian Government; the vessels were taken for

instance to a special part of the docks near the other captured enemy vessels and placed like them under the continuous supervision of the authorities, a prize court was immediately established, entered upon its duties forthwith, and continued its work up till the capture of Antwerp.

From before the capture of Antwerp and throughout the German occupation the Belgian Government always affirmed energetically its rights over these vessels, and indicated its well-defined intention to keep possession of them.

The rights of a possessor are not extinguished by the mere fact that he has temporarily ceased to have physical custody of the object: and in this respect his rights are not lost unless a third party obtains in his turn juridical possession of the object.

Germany had, it is true, custody of the vessels during the occupation, but it was in Belgian territory, over which she never exercised sovereignty, but only the limited rights of an occupant; furthermore the port of Antwerp being blockaded, she never had power to dispose of the vessels freely and was, therefore, unable to exercise over them completely and effectively the rights of a possessor: thus she was unable to employ the vessels in the natural way, and was unable to save them from the inevitable consequences of the events which took place, except by losing the custody of them.

The rights which Germany exercised over the *Atto* and the *Ganelon* were of a special and ill-defined character, approximating less to those of a possessor than to those of a fortuitous custodian.

Germany, by taking these vessels into Dutch territory just before the Armistice, and with the sole object of trying to save them from the inevitable consequences of the events which took place, violated the rule of international law which forbids a belligerent to introduce into neutral territory objects acquired by an act of war. The action is, therefore, illegal, deprived as such of all effect in law, and one which, so far as concerns the decision of the present case, should be regarded as non-existent; in consequence the *Atto* and the *Ganelon* should be treated as having never left Belgian territory.

Even if it were necessary to admit that the German custody of the *Atto* and the *Ganelon* must be considered as possession from the point of view of the rules of prize law, Germany in any event lost such possession under the Armistice Convention (Article 27).

Belgium, in recovering possession of the territory after the Armistice, *ipso facto* recovered possession of the *Atto* and the *Ganelon* with all the juridical consequences resulting therefrom.

The fact that the vessels are now with Belgium's consent actually in use at sea on Allied account makes no difference in the decision of the present case.

For these reasons:—

The Court, rejecting as unsound all conclusions inconsistent with the present judgment, consolidating the cases, holds that the intervention is not admissible, condemns for the benefit of the Belgian State the s.s. *Atto* and *Ganelon* with their equipment, fittings and accessories.[1]

(*sgd.*) H. MAFFEI.
PH. VERHEES.

[1] A similar decision was given at the same sitting of the Court in the case of the Austrian ship *Zora*. The case was practically identical with that of the *Atto* and the *Ganelon*, except that no petition was presented for liberty to intervene.

BRITISH AMERICAN PECUNIARY CLAIMS COMMISSION

By Sir Cecil Hurst, K.C.B., K.C., British Agent.

On August 18, 1910, Lord Bryce and Mr. Knox signed an agreement at Washington providing for the reference to arbitration of a large number of claims by British subjects against the United States Government, and by American citizens against the Imperial Government or against one of the Dominion Governments.

It was nearly forty years since a Commission had been held for the settlement of claims between the British and American Governments, the last such Commission having been that provided for by Articles 12 to 17 of the Treaty of Washington of May 8, 1871. The jurisdiction of the Washington Commission was limited to cases arising out of acts committed during the period from April 13, 1861, to April 9, 1865, inclusive, *i. e.* during the period when hostilities were in progress in the American War of Secession. A full account of the proceedings of the Washington Commission, which sat from June 3, 1873, till September 25, 1873, and dealt with 478 British and 19 American claims, will be found in the Report of the British Agent, Mr. Howard (afterwards Sir Henry Howard, G.C.M.G.).[1]

The only preceding Commission for the settlement of claims between Great Britain and the United States of America was the Commission provided for in the Convention signed on February 8, 1853, and ratified on July 26, 1853. The text of the Convention will be found in 42 State Papers, p. 34, and some account of the Commission, which was presided over by Mr. Joshua Bates, a London banker, of the firm of Baring Brothers & Co., is given in Moore's *International Arbitrations*, pp. 391–419. The report of Mr. Edmund Hornby, the British Agent, was printed, but copies of it are exceedingly rare.

The jurisdiction of the Commission was most comprehensive in character. It extended to all unsettled claims on the part of British corporations, companies or private individuals against the Government of the United States, and all claims on the part of American corporations, companies or private individuals against the Government of Her Britannic Majesty, which had arisen since the signature of the Treaty of Ghent (December 24, 1814) and which had been already presented to either Government, or which might be so presented within six months of the first meeting of the Commission. The decisions of the Commission were final, and claims, whether brought before the Commission or not, were to be thenceforward inadmissible if they arose out of transactions prior to the ratification of the Convention. The sole limitation upon the jurisdiction of the Commission, therefore, was that it could not deal with claims which arose before the signature of the Treaty of Ghent in 1814.

Individual claimants brought their claims before the Commission as of right. No Government intervention was necessary, and claimants who failed to make use of the opportunity afforded to them by the creation of the Commission were deprived of the chance of recovering compensation at a subsequent date.

The Commissioners were at work from September 16, 1853, to January 15, 1855; but the earlier weeks of their proceedings were occupied in the appointment of an Umpire, a matter over which they experienced some difficulty, and in settling the procedure.

[1] The report was published as a Blue Book: "North America, No. 2, 1874."

In all, the Commission of 1853 dealt with 75 British claims and 40 American claims, but on both sides some of the claims were of a compendious character and included many individual claimants.

For some little time before the conclusion of the Pecuniary Claims Convention of 1910, the outstanding claims between the two Governments had been causing considerable embarrassment and increasing friction. The American fishing rights along the coast of Newfoundland were one of the sources of trouble, as the claim by the territorial Government to regulate the exercise of the right and to levy customs and harbour dues on the fishing-boats was contested by the United States Government. The legal situation with regard to the Newfoundland fisheries has, of course, been determined by the decision of the North Atlantic Coast Fisheries Arbitration at The Hague in 1910, but there are other circumstances which are bound to give rise to claims from time to time along the Atlantic coast. The value of the fisheries, the difficulty for the crew of a fishing-boat when at sea to determine exactly whether they have or have not crossed the limits of territorial waters, the keen competition between the Gloucester fishing fleet and the Canadian fishermen, are sure to lead to incidents from time to time resulting in legal proceedings. Sometimes these legal proceedings do not close the matter as they should, and diplomatic representations and claims follow.

This is what had happened in the years before 1910. One or two Canadian decisions had provoked great discontent among the Gloucester fishermen and led to controversy between the Canadian and the American Governments. As the Canadian Government declined to meet the claims presented on behalf of the American fishermen, the United States Senate blocked the payment of any claims to British subjects, however good the claims might be on their merits.

The way out of the deadlock was found by establishing a new Commission to deal with the claims judicially, and by a willingness on the part of the Governments concerned to consent to the submission to the Tribunal of the claims which had led to the deadlock.

The Convention of 1910 [1] differs from the arrangements of 1871 and 1853 in that no claim comes before the Commission except as a matter of agreement between the Governments. The previous arrangements had given any claimant the right to bring his claim before the tribunal, and exposed him, if the claim fell within the competence of the Commission, to the penalty that his claim was barred if he did not bring it forward. Under the 1910 Convention the submission of the claim to the Tribunal requires the consent of the respondent Government, and claims are not barred unless the claimant Government does not choose to take the necessary steps to keep them alive. This result is brought about as follows.

Under Article 1, either party may, within four months of the confirmation of the agreement, present to the other party a list of the claims which it desires to submit to arbitration. If the other party is not prepared to submit to arbitration a claim presented in this way, it may "reserve" it. Claims so reserved escape the operation of the barrer clause (Article 2). If the claim is not reserved, it will in due course be included in some subsequent schedule of claims to be heard by the Commission; but each schedule of claims is from the diplomatic point of view to be regarded as a separate Agreement, and requires,

[1] Treaty Series, 1912, No. 11.

on the American side, the consent of the Senate, and on the British side, if the claim affects a self-governing Dominion, the concurrence of the Government of that Dominion. A schedule does not become binding until it is confirmed by an exchange of notes (Article 10), thus in effect providing for ratification.

Articles 3 to 7 inclusive deal with the appointment of the Tribunal and with the procedure.

Article 8 provided for the payment of the sums awarded within eighteen months of the final award, and Article 9 provided for the payment of the expenses of the Commission by means of a deduction (not exceeding 5 per cent.) from the sums awarded, the remainder being defrayed by the Governments in equal moieties.

Under Article 10 the Agreement was not to become binding until it was confirmed by an exchange of notes between the Governments.

The First Schedule of claims to be arbitrated under the Agreement was signed at Washington on July 6, 1911, by Lord Bryce and Mr. Knox, before the Agreement had itself been confirmed. Both the Agreement and the First Schedule of Claims were brought into operation by confirmation nine months later by an exchange of notes on April 26, 1912.

The First Schedule contained the names of 315 claims, but of these 161 are claims against the Government of Newfoundland, where the legal principles involved will probably be found to have been settled by the North Atlantic Coast Fisheries Arbitration, and where only the facts will require investigation by the Commission. Of the remainder, many fall into well-defined categories in which a particular claim can be argued before the Commission as a test case, or the whole group can be dealt with in one set of arguments. After the elimination of these, however, there remain a large number of cases requiring individual consideration and decision by the Commission.

It is perhaps unfortunate that no such thing as a Statute of Limitations exists as between sovereign States. The limitation of the jurisdiction of the 1853 Convention to claims which arose after December 24, 1814, has led to the submission to this new Claims Commission of some claims which are still unsettled and which arose more than a hundred years ago.

Attached to the First Schedule of Claims were four "Terms of Submission" which have so important a bearing on the work of the Commission that it may be well to quote them textually.

Terms of Submission

"1. In case of any claim being put forward by one party which is alleged by the other party to be barred by Treaty, the arbitral tribunal shall first deal with and decide the question whether the claim is so barred, and in the event of a decision that the claim is so barred, the claim shall be disallowed.

"2. The arbitral tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward.

"3. The arbitral tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain

satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim.

"4. The arbitral tribunal, if it considers it equitable, may include in its award in respect of any claim interest at a rate not exceeding 4 per cent. per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party and that of the confirmation of the Schedule in which it is included."

The notes confirming the Agreement and First Schedule of Claims extended the power to make rules of procedure. Article 5 of the Agreement had given this power to the Tribunal exclusively. The notes contained a provision which enabled the Agents of the two parties to agree upon a rule or mode of procedure, and such agreement was to have the force of an order of the Tribunal and be entered upon the records at the next session of the Tribunal as part of the proceedings.

The Agreement and the First Schedule of Claims were confirmed by notes exchanged at Washington on April 26, 1912, and in due course the Tribunal was organised by the appointment of Monsieur Henri Fromageot, Legal Adviser of the Ministry for Foreign Affairs in Paris, as Umpire, of Sir Charles Fitzpatrick as British Member, and Mr. Chandler P. Anderson as American Member. On the British side, Mr. C. J. B. Hurst, K.C., was appointed Agent, and Hon. E. L. Newcombe, K.C., Deputy Minister of Justice in Canada, was appointed Associate Agent. On the American side, Mr. Mallet Prevost was appointed Agent, and Mr. R. Lansing, Assistant Agent. Mr. Mallet Prevost resigned in 1913, and was succeeded as Agent by Mr. Lansing, who himself resigned in 1914 on his appointment as Counsellor to the Department of State. No successor has yet been appointed.

Acting under the powers conferred by notes exchanged on April 26, 1912, the two Agents agreed, and signed the Rules of Procedure for the Commission on July 11, 1912.

The Tribunal assembled for the first session in Washington on May 13, 1912, the sittings being held in the United States Commerce Court. Three weeks later the Commission transferred the sitting to Ottawa. Seven cases only were argued during the first session, and the decisions in four of these were announced before the session was closed at Ottawa: among the cases decided was that of Hardman.[1]

The second session was opened at Washington on March 9, 1914, and lasted till May 1 of that year. Fifteen cases were argued during the second session, involving twenty claims. Six decisions were announced by the Tribunal on May 1, including two decisions in respect of cases argued in 1913. The arbitrators intended to meet in Paris at the beginning of August 1914 to agree and announce their decisions in the remainder of the cases which they had heard, but the war broke out and suspended all further proceedings in connection with the Commission.

Since the re-establishment of peace, the Governments concerned agreed to authorise the Umpire to announce any decisions of the Tribunal which might have

[1] Reported on p. 197 *infra*.

been agreed by the Arbitrators, and at a sitting in Paris on December 18, 1920, Monsieur Fromageot announced four more decisions.

(Reports of the decisions of the Commission will be published from time to time in the *British Year Book of International Law*.)

PECUNIARY CLAIMS ARBITRATION

CLAIM NO. 2—HARDMAN

War Losses—Property destroyed to safeguard the health of the troops—Right of the owner to compensation.

WILLIAM HARDMAN was employed as an engineer by an American company, the Juragua Iron Works, at Siboney, in Cuba, at the time of, and during the war between Spain and the United States. On July 12, 1908, the United States military forces gave orders for the destruction of the town of Siboney in consequence of sickness among the troops and of fear of an outbreak of yellow fever. Hardman occupied a house belonging to his employers; the furniture was his own. He had no time to remove his furniture, which was entirely destroyed with the house in which he lived. Compensation was claimed on his behalf by the British Government. No fighting was in progress in the vicinity of Siboney at the time of its destruction.

The American company for which Hardman worked instituted proceedings in the Court of Claims in the United States to recover compensation from the American Government for the destruction of their property at Siboney. The company owned, not only the house in which Hardman lived, but sixty-five others all of which were destroyed, together with the workshops, etc. The Court of Claims dismissed the petition of the company, holding that property of citizens of the United States in Cuba during the war must be regarded as enemy property, and was, therefore, subject to the laws of war and liable to be destroyed whenever military necessity so demanded, without the owners being entitled to compensation. The company appealed from the decision of the Court of Claims to the Supreme Court of the United States (212 U.S. Reports 297), but the appeal was dismissed upon the ground that the elements of the case implied no contract on the part of the U.S. Government to pay for the property destroyed, and that the case was, therefore, not one in which the Court of Claims could give relief.

The facts in the case were not in dispute.

Hardman at first applied direct to the United States Government for compensation, but his application met with no response, and in January, 1910, the claim was presented to the State Department through the British Embassy. The claim was investigated by the American authorities, and in due course was recommended to Congress by the State Department as a meritorious claim. The Senate reported against the claim upon the ground that Hardman's nationality did not entitle him to any special consideration as he was domiciled and employed in Cuba, and that the U.S. Army had a right to destroy the property without making compensation to the owners as an act of war and in order to prevent an epidemic of yellow fever. The Senate based its view upon the fact that just as

at common law everyone had the right to destroy real and personal property in case of actual necessity, *e. g.*, to prevent the spread of fire, so the U.S. Army in time of war in enemy country had a right to destroy property for the preservation of the health of the Army, and therefore, the United States were not liable to make compensation. No appropriation was made for the payment of the claim, and as it remained unsettled, it was ultimately brought before the Claims Commission.

On behalf of His Majesty's Government it was admitted that compensation for " war losses " could not be claimed as of right, but it was maintained that there were limitations to this principle, and that claims for the destruction of property by belligerent commanders merely for the purpose of securing the health and increasing the comfort and convenience of the troops, and not in the course of military operations against the enemy, were not claims for " war losses " in the proper sense of the term. The American troops had been in undisturbed possession of Siboney for some days, and no enemy troops appear to have been in the vicinity. It was conceded that when a district was under military occupation the authority of the commander-in-chief was sufficient to justify the destruction of personal property as a precautionary measure on the grounds of public health, but it was argued that the right must be exercised subject to the payment of compensation. The destruction could not be justified under the common law, because it would not apply in Cuba, nor was any evidence supplied to show that it could be justified under the municipal law in force in Cuba.

For the United States, it was argued that the property of a neutral or an alien in hostile territory is considered as enemy property, regardless of the status of the owner, and when in the track of war is subject to the casualties of war like the property of natives; that the military authorities have the right to destroy private property in order to protect their forces from hostile attack or to facilitate their own operation without becoming liable to pay compensation; and that for the same reason they may destroy private property to protect the health of the troops.

On June 18, 1918, the Tribunal made the following award, dismissing the claim.

AWARD IN THE MATTER OF CLAIM NO. 2: WILLIAM HARDMAN

British Memorial filed September 9, 1912.
United States Answer filed April 10, 1913.
Hearing of the Case May 16, 1913.
Decision given June 18, 1913.

Counsel:

Great Britain: Mr. Cecil Hurst.
United States: Mr. J. R. Clark; Mr. C. F. Wilson.

On or about the 12th July, 1898, during the war between the United States and Spain, while the town of Siboney, in Cuba, was occupied by the United States armed forces, certain houses were set on fire and destroyed by the military authorities in consequence of sickness among the troops and from fear of an outbreak of yellow fever. In one of these houses was some furniture and personal

property belonging to a certain William Hardman, a British subject, which was entirely destroyed with the house itself.

The British Government claim, on behalf of the said William Hardman, the sum of 98*l.* as the value of the said personal property and furniture, together with interest at 4 per cent. for thirteen years from March 1899, when the claim was brought to the notice of the United States military authorities in Cuba, to the 26th April, 1912, when the schedule to the Pecuniary Claims Agreement, in which the claim was included, was confirmed, *i. e.*, 49*l.*, the full claim being, therefore, for the total sum of 142*l.*

The United States denies that it is liable in damages for the destruction of the personal property of William Hardman, and contends that the United States military authorities, who were conducting an active campaign in Cuba, had a right, in time of war, to destroy private property for the preservation of the health of the army of invasion, and that such authorised destruction constituted an act of military necessity, or an act of war, and did not give rise to any legal obligation to make compensation.

The two parties admit the facts as above related, and agree as to those facts. The British Government do not contend that Hardman's nationality entitled him to any special consideration. At the hearing of the case they did not maintain their former contention that there is not sufficient evidence of the same interest to destroy the furniture as the house. They admit that necessary war losses do not give rise to a legal right of compensation. But they contend that the destruction of Hardman's property was not a war loss in that it did not constitute a necessity of war, but a measure for better securing the comfort and health of the United States troops, and that in that respect no private property can be destroyed without compensation.

The question to be decided, therefore, is not whether generally speaking the United States military authorities had a right, in time of war, to destroy private property for the preservation of the health of the army, but specially whether, under the circumstances above related, the destruction of the said personal property was or was not a necessity of war, and an act of war.

It is shown by an affidavit of Brigadier-General George H. Torney, Surgeon-General, United States Army (United States answer, Exhibit 8), who personally was present at that time at Siboney and familiar with the sanitary conditions then existing in that place, that the sanitary conditions at Siboney were such as made it advisable and necessary to destroy by fire all buildings and their contents which might contain the germs of yellow fever. No contrary evidence is presented against this statement, the truth of which is not questioned.

In law, an act of war is an act of defence or attack against the enemy and a necessity of war is an act which is made necessary by the defence or attack and assumes the character of *vis major*.

In the present case, the necessity of war was the occupation of Siboney, and that occupation which is not criticised in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, *i. e.*, the destruction of the houses and their contents.

In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war, and, according to the principle accepted by the two Governments, it does not give rise to a legal right of compensation.

On the other hand, notwithstanding the principle generally recognised in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitary conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favour, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which cannot be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. In this connection the Tribunal cannot refrain from pointing out the various benevolent appreciations given by the Department of State in this particular case, and commends them to the favourable consideration of the Government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.

Upon these motives,

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

The President of the Tribunal:

HENRI FROMAGEOT.

Ottawa, June 18, 1918.

A QUESTION OF NATIONALITY

WILL any of the readers of the Year Book contribute their views as to whether the infant C. referred to in the following paragraph should, in view of the present state of English law, Scottish law and Egyptian law upon the subject, and also of international comity, be regarded as a British subject in Egypt and registered accordingly?

In 1880 A. was born in Scotland, where he was brought up and educated. In 1902 he went to Alexandria and entered his father's business there. A.'s father had also been born and brought up in Scotland, but had resided and carried on business in Alexandria for many years. A. was born during a short stay of his parents in Scotland and was brought up by an uncle.

In 1916 A. became the father of an illegitimate child, C., born at Alexandria. The mother, B., had also been born and brought up in Scotland, but since 1909 had been employed as a typist in A.'s business in Alexandria.

Six weeks after C.'s birth A. married B. at Alexandria, the marriage being solemnised by a marriage officer under the Foreign Marriage Act. Immediately after the marriage A. went through the forms prescribed by the laws of Scotland in order to legitimise C. "*per subsequens matrimonium.*" Egyptian law recognises legitimation *per subsequens matrimonium.* A. is now anxious that C. should be registered as a British subject in the register of British subjects kept at the Consulate-General at Alexandria under the Orders in Council in force in Egypt under the Foreign Jurisdiction Act, but the question arises whether C. can be regarded as a British subject.

DIGEST OF CASES

CASES DEALING WITH INTERNATIONAL LAW DECIDED BY THE ENGLISH COURTS DURING THE PAST YEAR

By ANDREW ERIC JACKSON, LL.D., O.B.E., Solicitor.

THE cases coming before the Prize Court of first instance have been decreasing in numbers and interest, but many of the cases noted in last year's digest have since been before the Judicial Committee of the Privy Council.

The decision in the *Düsseldorf* (1920, A.C. 1034) was varied by the Privy Council. The *Düsseldorf* was a German ship captured in Norwegian territorial waters without intentional violation of those waters, but through an error of judgment by the captors. The Judicial Committee decided that the expenses of returning the ship to Norwegian or other territorial waters must be paid to the Norwegian Government, but not any sum for the use of the ship pending the decision of the Prize Court by way of damages to that Government.

On the other hand, the decision of the Prize Court in the case of the *Valeria* (1920, P. 81) was upheld by the Judicial Committee (1921, 1 A.C. 477). The *Valeria* was also a German ship captured *bona fide* in Norwegian territorial waters, but lost through perils of the seas whilst being brought to this country to be placed in the Prize Court. The Judicial Committee held that whilst if the ship had been in existence she would have been restored to the Norwegian Government, that Government had no claim to have the value of the vessel paid to them.

The appeal against the decision of the Prize Court condemning the *Dirigo* for the carriage of contraband was abandoned (1920, P. 425), but the meaning of the decision in the *Hakan* (1918, A.C. 148) was considered by the Judicial Committee in the *Zamora* (No. 2), (1921, 1 A.C. 801). They held that captors need not make out the knowledge of the shipowners, as prosecutors have to bring home a charge to a person accused in an English Criminal Court. If the facts of each case warrant the inference that the shipowners knew that they were carrying contraband, the decree of condemnation will follow. On the facts the Judicial Committee held that the owners of the *Zamora* knew the purpose for which this vessel was being used, and confirmed the condemnation.

The decision in the *Edna* (1919, P. 157) was confirmed by the Judicial Committee (1921, 1 A.C. 735). They held that if Article 56 of the Declaration of London means that the bona-fide neutral purchasers of a ship of enemy nationality at the outbreak of war have to prove that the transfer was made by the transferor otherwise than for the purposes of evading capture and condemnation, the Article altered the law of nations as administered by the British Prize Courts, and was an enhancement, and not a waiver, of belligerent rights, and therefore could not alter the practice of the British Prize Courts as laid down in the *Baltica* (11 Moo. P., C. 141). The release of the *Edna* was

confirmed, but again without damages and costs, on the ground that there were reasonable grounds for capture and inquiry.

In the *Falk* (1921, 1 A.C. 787) the Judicial Committee confirmed the decision of the Prize Court, and held that where contraband goods had been seized upon reasonable suspicion that they had an enemy destination, and subsequently released after inquiry, the owners of the goods were not entitled to damages and costs.

The decision in the *Bernisse* and *Elve* (1920, P. 1) was confirmed by the Judicial Committee (1921, 1 A.C. 458) on the ground that the vessels were seized under a mistake as to the meaning of the Reprisals Order in Council of February 16, 1917, and not for the purpose of searching for contraband, and therefore the captors were the insurers of the vessel after the seizure. Their Lordships held, whilst very slight suspicion would be sufficient to justify sending a vessel into port for the purposes of search, yet the decision of the President as to the reasons why these vessels were sent in was final. They further declined to follow the judgment of Lord Stowell in the *Luna* (Edw. 190), though that decision had previously been followed by Sir Samuel Evans in the case of the *Sigurd* (1915, P. 250).

The decision in this case still seems a harsh one, since it makes the captors insurers of property seized by them against the illegal acts of the other belligerents, and not merely against the ordinary perils of the seas and negligence on the captors' part.

In the *Marie Leonhardt* (1921, P. 1) Sir Henry Duke held that the practice whereby in modern times enemy merchant ships had been allowed to depart freely within a given fixed time, constitutes an act of grace, and not a rule of international law, and that in the absence of reciprocal agreement the Hague Convention No. 6 of 1907 did not apply to such ships. The *Marie Leonhardt* and other enemy merchant vessels which were in British ports at the outbreak of war, and had been detained, were condemned, and in the case of the *Blonde* and other ships (37, T.L.R. 853) Sir Henry Duke held that, notwithstanding that under the Treaty of Versailles the city of Danzig was to be made a free city of Sovereign power, merchant ships registered at that port at the outbreak of war, but in British ports at the commencement of the war, were enemy ships, and to be condemned accordingly.

The judgment of the Prize Court in the case of the *Prins der Nederlanden* (1920, P. 216) was reversed by the Judicial Committee (1921, 1 A.C. 754). The President had allowed the neutral shipowners freight in respect of the carriage of contraband goods, on the ground that they did not know the character of the cargo. The Judicial Committee held that the Prize Court has jurisdiction to award freight, but the discretion of doing so must be exercised only in very exceptional cases, and its allowance or disallowance does not turn merely on the question whether the owners were ignorant of the character of the cargo; and they refused to allow freight to the neutral owners.

In the case of the *Kronprinsessan Margareta* (1921, 1 A.C. 486) the doctrine of infection was considered by the Judicial Committee. The doctrine was upheld as a long-established rule of the law of Prize. The Judicial Committee further held, that in applying the rule, effect must be given to the Rule of Prize which refuses to recognise transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee when unaccompanied by the actual

delivery of the goods. They laid down that in applying the doctrine of infection the ownership of the goods at the date of the capture, and not the control of the goods, is the test. They further held that "infected goods" in a neutral ship were not protected from condemnation by the Declaration of Paris.

In the *Oscar 11* (1920, A.C. 748) the Judicial Committee held that the Procurator-General was, under the Prize Court Rules 1914, substituted for the actual captors, and liable for damages and costs. Damages were therefore awarded against the Procurator-General for the loss of cargo on board the *Oscar 11*, which was caused through a collision between that vessel and the warship which captured her, owing to the negligence of those in charge of the warship.

In the *Noordam* (No. 2) (1920, A.C. 904), the Judicial Committee decided that securities, such as bearer bonds and coupons, shipped by letter mail were not "postal correspondence" so as to be exempted from seizure under the Hague Convention No. 11, and were good subject of Prize.

In the *Orteric* (1920, A.C. 724) the Judicial Committee upheld the decision of the Prize Court, and held that goods which at the date of their seizure in Prize were not enemy property could not be condemned as enemy goods, although the property under them had passed to the enemy subsequent to the seizure and before the issue of the writ claiming condemnation.

In the *Vesta* (1920, P. 385) Sir Henry Duke held that enemy goods which had been seized subsequent to trans-shipment in a neutral port after the outbreak of war were liable to capture and condemnation where the enemy sellers still retained an interest in the goods. This decision, however, was reversed in the Judicial Committee (1921, 1 A.C. 774), on the ground that the neutral purchasers had taken actual delivery at Lisbon, and their right to reject the goods if they found them unsuitable to their manufacturing business did not render the same ineffective as a transfer of the goods to the purchasers, and that the delivery and possession of the goods terminated the original transit and the belligerent right of capture.

The decision of the Prize Court in the case of the *Axel Johnson* (1917, P. 234) was confirmed by the Judicial Committee (1921, 1 A.C. 473). In that case wool had been purchased by neutrals in Sweden with the intention of sending the wool to Germany to be combed under an arrangement whereby the wool after combing was to be returned to Sweden, though some of the waste wool would remain in Germany. The wool, which was absolute contraband, was condemned on the ground that it had an enemy destination.

Apart from Prize Cases the most interesting decision on international law was the case of *Aksionairnoye Luther* v. *Sagor & Co.*,[1] decided by Roche J. (1921, 1 K.B. 456), whose decision has, however, since been reversed by the Court of Appeal (37, T.L.R. 777).

[1] This case is fully discussed by Mr. A. D. McNair on pp. 60 fol. *supra*.

OBITUARY NOTICES

SIR JOHN MACDONELL

THE death of Sir John Macdonell makes a great gap in the ranks of English jurists. For very many years, and over a wide range of subjects, he was constantly contributing to the knowledge of law by his investigations, and in the associated efforts which have been made in recent years to promote this object he was an acknowledged leader. By his sympathy and co-operation he not only worked to advance legal science himself, but helped others to do so.

It is a marvel of industry that Macdonell was able to accomplish so much in addition to the duties of the office of Master of the High Court, which he held from 1889 until only about a year before his death. But this is not the place to give a detailed account of the activity which he showed during a long life in manifold ways, or even to enumerate the various commissions and other public bodies on which he served. The value of his work in editing judicial statistics has been repeatedly acknowledged by ministers and judges who have made use of them.

It may be mentioned, too, that to mercantile law he made important contributions. In this branch his best known work was his edition of Smith's *Mercantile Law*, with a valuable preface. But of recent years he devoted himself mostly to the study of comparative law and of international law. In almost every step that has been taken to promote these studies he rendered invaluable help, not only by his writings and lectures, but by his personal interest and active participation in the various Societies which were devoted to those subjects. He became Editor of the *Journal of the Society of Comparative Legislation* in 1897. The value of that journal, carried on under his editorship, has been very widely recognised, especially as giving very full information as to legislation in all parts of the Empire.

Results have certainly proved that the foundation of the Quain Chair of Comparative Law in University College, London, and the election of Macdonell to that Chair, have had a most far-reaching effect in spreading the knowledge of a subject of great practical as well as theoretical importance. Though not obliged by the conditions of the Chair to do so, it was his custom to give a few general lectures each year on some special topic of international law, some of which have been published. He was first an Associate, and afterwards a Member, of the Institut de Droit International, and took a leading part in the International Law Association, attending its meeting at Portsmouth last year. His interest in legal education was unfailing. He was the first Dean of the Law Faculty in the University of London, and in 1912 was elected President of the Society of Public Teachers of Law. From the foundation of the Grotius Society he took a leading part in its deliberations, and in 1919 was elected President.

Notwithstanding his continued exertions on behalf of earlier undertakings, he took a keen interest in the more recent project of bringing out the *British Year Book of International Law*. He was on its Editorial Committee and himself contributed an article on "International Labour Conventions" to the first number. He was preparing an article for the present number, which unfortunately he did not live to complete. Moreover, shortly before his death, he made a number of valuable suggestions about the way in which the *Year Book* should be conducted.

His last and most difficult task—the performance of which has not received its due recognition—was to act, at the request of the present Lord Chancellor, then Attorney-General, as Chairman of the Committee appointed to report on Breaches of the Laws and Customs of War by the enemy countries in the late war. The legal questions involved were often difficult, the questions of fact involved an enormous amount of labour. He devoted himself assiduously to the work, and it certainly overtaxed his strength. His activity continued to the very last weeks of his life, and to the end he showed a keen interest in everything likely to promote the studies to which he was specially devoted. An interesting paper from his pen appeared in the *Contemporary Review* shortly after his death. It shows how at the end of life he felt the weight of the troubles and dangers through which the world is passing, and which are impending over it, and emphasises the need for a changed spiritual outlook in world politics.

ERNEST NYS

On September 4, 1920, Belgium lost one of her most illustrious sons, within half a year of his seventieth birthday. Simple in his habits, Ernest Nys was an indefatigable worker and an insatiable reader.

Nys was born at Courtrai on March 27, 1851, of Flemish parents. He received his education at Ghent University under the famous Fr. Laurent. Soon after the Franco-German War, and after having obtained his degree of Doctor of Law, he visited the Universities of Heidelberg, Leipzig and Berlin, whence he returned in 1876. He did not figure in public life; the seriousness of his work absorbed the whole of his time and his ambitions.

The bar, at which he practised for a brief period, had little attraction for his scholarly, studious and searching mind. In 1882 he entered upon a magisterial career as judge of first instance at Antwerp. In the next year, 1888, he was transferred in the same capacity to the Court at Brussels, and henceforward continued to fill high judicial posts in the capital, becoming, on February 11, 1920, President of the Court of Appeal. His judicial functions alone did not suffice to occupy all his time and thought. In 1885 he accepted a Professorship of Legal History and Jurisprudence in the Brussels University (*université libre*), and in 1898 succeeded Rivier—who had acted as his mentor in his early days—as Professor of International Law in the same University, at the same time teaching European diplomatic history at the *École des Sciences politiques et sociales*.

At an early period in his life he visited England and made the acquaintance in London of the Reading Room of the British Museum. So vast and unlimited

a storehouse of learning drew Nys irresistibly towards the metropolis, and from 1877 onwards he spent his holidays under the vast dome of that immense library.

Of his value as a scholar and exponent of international law his voluminous output of books and treatises, articles and brochures, bear unmistakable evidence. It would lead me too far were I to enumerate them all. I shall limit myself to some of his principal writings.

Of his early works, *The Papacy Considered in Relation to International Law*, was published in 1879 in London; in 1885 he translated into French, for the benefit of his fellow-countrymen, James Lorimer's *Institutes of the Law of Nations*, and in 1895 John Westlake's *Chapters on the Principles of International Law*.

On the subject of international law his standard work is *Le droit international, les principes, les théories, les faits*, which appeared in book form, in three volumes, in 1904–1906 (new edition, 1912). Further may be mentioned *Le concert européen et la nature du droit international* (1899), *Notes sur la neutralité* (1900), *Études de droit international et le droit politique* (2 vols., 1896–1901), *L'état indépendant du Congo et le droit international* (1908), *Droit international et franc-maçonnerie* (1908), *Les États-Unis et le droit des gens* (1909).

Of his works on the history of international law there appeared, in 1881, *La guerre maritime*, in 1882 *Le droit et la guerre et les précurseurs de Grotius*, in 1884 *Les origines de la diplomatie et le droit d'ambassade jusqu'à Grotius*, in 1891 *Les théories politiques et le droit international en France jusqu'au XVIII^ème siècle*, in 1890 *l'Esclavage noir devant les jurisconsultes et les cours de justice*, in 1893 *Le Réglement du rang du Pape Jules II*, *Les Publicistes espagnols au XVI^e siècle*, and in 1898 *Recherches sur l'histoire de l'économie politique*.

In addition Nys collaborated largely in the *Revue de droit international et de législation comparée*, *La Belgique Judiciaire*, *Société Nouvelle*, the *Law Quarterly*, the *Juridical Review*, and other periodicals. Politically Nys felt himself above all a son of Flanders. In the Scheldt controversy with Holland he took an active part, and from his hand we find *Une clause des traités de* 1914 *et de* 1839, *Anvers, port de commerce* (1911), *L'Escaut en temps de guerre* (1910), and *L'Escaut et la Belgique* (1920).

It is not surprising that the worth of such a man was widely recognised in the learned world. He was a Doctor of Law *honoris causa* of the Universities of Oxford, Edinburgh and Glasgow, and a member of the Institut de Droit International, of which he became President, while he represented his native country in the Permanent Court of Arbitration at the Hague.

Nys' opportunity to apply his valuable learning to the practical needs of his country came with the war and the German occupation of Belgium. From the very first day he was appealed to for advice and guidance, which were immediately and unceasingly given, ungrudgingly and out of the fulness of his patriotic heart. His opinions have all been preserved and comprise volumes, showing how assiduously he worked to assist his fellow-countrymen in the dark days when the country was overrun by the enemy and it was difficult to follow legal maxims in the clashing of interests, especially when the judges would not sit and the Courts refused to submit to the foreign will.

W. R. Bisschop.

JOHN PAWLEY BATE

On February 10, 1921, John Pawley Bate died suddenly, almost immediately after delivering two lectures at the Inns of Court.

Born in 1857, he was the son of a Wesleyan minister, and had to make his own way in the world. For a time he occupied a post in the Patent Office, but soon resigned it to devote himself to what was to be the work of his life—teaching. After holding lesser offices he obtained a mastership in the Leys School at Cambridge, and while there read for the Law Tripos at the University, graduating in 1884. Later he resigned the Leys mastership, and soon became the busiest and most successful of law coaches. He was made a Fellow of Trinity Hall, and in 1897 he was appointed Reader of Roman and International Law at the Inns of Court; and, as he then also held the Chair of Jurisprudence at University College, he found it expedient to remove to town.

Although nearly sixty when the war broke out, he joined the Anti-Aircraft Force. This often involved prolonged physical exertion and exposure, which was too much for his constitution, and was probably the cause of the heart trouble which killed him. After the war he was appointed English legal representative on the staff of the League of Nations—a post which proved a disappointment to him, and which he ultimately resigned.

When not in London he lived near Honiton and served as a Justice of the Peace for Devonshire.

The most important part of Bate's work in connection with international law was academic, and done at the Inns of Court, and in spite of the fact that international law is not a subject of examination for the Bar, or one promising pecuniary reward for the barrister, he contrived to attract many students to his lectures. The volume of his published writings is not large, but the matter of it is excellent, the best known being his Essay *Notes on the Doctrine of Renvoi*. He also wrote a pamphlet on *The Declaration of London*, and during the war some articles on points of international law, which appeared in the *Quarterly Review*, and many elaborate opinions for the Admiralty and Foreign Office which have not been published. He also translated for the Carnegie Institute the works of Ayala, Textor and Rachel, and for the Swiss Government the Federal Council's Recommendation that Switzerland should join the League of Nations.

J. A. S.

GEORGES FRANCIS HAGERUP

Like Belgium, Norway has recently suffered the loss of one of its most distinguished citizens, Georges Francis Hagerup, who served his country as a man of learning, as a statesman and as a diplomat for over forty years.

Born on January 22, 1853, at Horten, near Christiania, he first studied medicine at the University of Christiania, but soon abandoned that subject for the study of law. In 1877, the year after he had passed his law examination, he visited Germany and France, and on his return acted for a year as assistant to a judge of first instance. The prospect of a magisterial career had no attractions for him, and was abandoned in 1879, when he received a scholarship attaching him to the legal faculty of the University of Christiania.

In 1885 he became a Doctor of Laws, and was appointed acting, and in 1887 ordinary, Professor of civil and criminal law and procedure in that University. This professorship he retained until 1906.

In 1891 Hagerup became extraordinary member of the Norwegian Supreme Court, and two years later he accepted the portfolio of Minister of Justice in the Emil Stang Ministry. The following year he became Premier and President of the Cabinet, which he remained until 1898. After the resignation of the Cabinet he returned to his professorial duties, and was from 1898 to 1908 member of a committee for the preparation of a Draft Code for Civil Procedure. In 1900 he was elected a member of the Storting, and in 1902 he again became Premier. He was strongly opposed to the dissolution of the Union between Norway and Sweden, and when this took place in 1905 he resigned the Premiership. The defeat of his (the Conservative) party was a death-blow to Hagerup's political career. Some time afterwards he was appointed Norwegian Minister in Copenhagen, where he remained until 1916. During that time he was also accredited at the Courts of Belgium and Holland and lived for a time in Brussels. In 1916 he was transferred to Stockholm.

A few years after the dissolution of the Union the Norwegian Government once more employed Hagerup on several important missions in Norway and abroad. At the time of his death, he was occupied with the task of reorganising the Norwegian Foreign Office and the Norwegian Diplomatic and Consular Services.

Until Hagerup began his diplomatic career, his studies from an international point of view were mainly concerned with comparative law. When he died he had completed a scientific treatise on public international law, which he never published, being discouraged by the developments of the Great War and the negation of its principles during that period. Hagerup founded, in 1887, the most important legal review in Scandinavia—*Tideskrift for Retsvidenskab*—and he himself often wrote articles for it.

He was Honorary Doctor of the University of Upsala, Lund and Leipzig, a member of the Swedish Academy of Science, and he received the Danish Oersted Medal in gold. At an early date (1892) he became a member of the Institut de Droit International, in whose deliberations he took an active part, and he afterwards served on the Comité Maritime International.

He represented his country on many occasions at international conferences, and he was a member of the Second Peace Conference at the Hague in 1907. He never sat on arbitration tribunals. When the international committee was formed by the Council of the League of Nations to prepare a draft for the International Court of Justice, Hagerup was invited to represent Norway as one of the ten members thereof, and as such he lent considerable assistance to its deliberations. His last public act was to preside over the sub-committee for that Court in the assembly of the League of Nations at Geneva in 1920. His failing health was then already apparent and he died on February 8, 1921.

W. R. Bisschop.

(With acknowledgments to Professor Hammerskjöld of the League of Nations, Geneva, and Mr. G. Conradi of the Norwegian Legation in London.)

HENRY GOUDY

THE death of Professor Goudy, in his seventy-third year, which took place on March 28, 1921, in Bath, has deprived us of one of our leading jurists. He was best known as a teacher and writer on Roman Law, but he took a great interest in the development of the Law of Nations, and on this account it is only fitting that some mention should be made of him in these pages.

Of Scotch origin, he was an Ulsterman by birth. He attended school first in Ireland and then in Scotland, at St. Andrews. He became a Master of Arts of Glasgow University, and afterwards studied law in Edinburgh, proceeding to the LL.B. Degree of that University. His inclination to study law scientifically took him in 1871–2 to the University of Königsberg, an event which had a lasting influence on his future career. In 1873 he returned to Edinburgh, and after a time became an Advocate. He specialised in Bankruptcy Law, and wrote a treatise on it which is still the leading work on the subject. In 1889 he succeeded Professor Muirhead, whose treatise on Roman Law he afterwards edited, as Professor of Civil Law at Edinburgh. He was Editor of the *Juridical Review* from its foundation till 1893, when he was appointed Regius Professor of Civil Law at Oxford as successor to Lord Bryce. He held this Chair till 1919, when he resigned it. Under modern University Statutes the Professorship is closely connected with All Souls' College, which made him one of its Fellows and continued him as such till his death. Being a bachelor he resided in College, and took full part in its social life. The excellent work he did for his Chair and in other ways at Oxford has been described by others, and this is not the place to dwell on it. Considering his intimate knowledge of the subject, his literary output was small, which is to be attributed to two serious illnesses which he suffered from, one at the beginning and the other towards the end of his career. He was a man who was always on the side of progress, and he was particularly zealous in the cause of legal education. Thus he was the chief founder and first President (in 1909–10) of the Society of Public Teachers of Law, and he again became its President in 1918–19. His opening address to the Society in the latter year, which has been published, was on law reform of various kinds which he advocated. It was delivered at Gray's Inn, which Society had paid him—a Scotch lawyer—the singular honour of making him a Bencher. In this he drew particular attention to the want of adequately endowed Chairs of International Law in London. He was also one of the founders and first Presidents of the Grotius Society, and at its meetings his summing up of discussions was remarkable for lucidity and impartiality. He was an Associate of the Institut de Droit International and attended its meetings at Oxford and at Madrid. He welcomed the foundation of the Edward Fry Memorial Library of International Law, and was one of its Trustees. The League of Nations, even in its present imperfect form, met with his cordial support. In a paper which he wrote in the *Journal of the Society of Comparative Legislation*,[1] he discussed the question of what is meant in the Covenant by Mandatory Government, considering how far it conforms to the ordinary principles of mandate in private, and particularly in Roman private, law.

[1] Third Series, Vol. *i.*, 1919, pp. 175–182.

SAKUYÉ TAKAHASHI

DR. SAKUYÉ TAKAHASHI, who died on September 12, 1920, aged fifty-four, was born on October 10, 1869, in Shinano, one of the most picturesque provinces of Japan. His family belonged to the *samurai* class.

After graduating from the Law College of Tokio Imperial University, he was appointed Professor of the Naval College in the year 1894, marked by the outbreak of the Chino-Japanese war. He consequently became an attaché to the Japanese fleet staff, and in this capacity had to deal with many complicated questions of international law. His services were highly appreciated by the Government, and he was sent to Europe in order to pursue further his special studies, which he did mostly in England and Germany. In 1900 the Degree of Doctor of Laws was conferred upon him, and he became Professor of International Law in the University of Tokio.

With the formation of the Okuma Cabinet in 1914, Dr. Takahashi filled the important post of President of the Legislation Department in the Cabinet till October 1916, when he was made a member of the House of Peers on account of his meritorious services.

In the meantime his reputation as a writer on international law became more and more established, and the British International Law Association and some other learned bodies made him honorary Vice-President. Among his writings may be named the following: *Cases on International Law during the Chino-Japanese War* (in English), *Aeusserungen über völkerrechtlich bedeutsame Vorkommnisse aus dem chinesisch-japanischen Seekrieg und des darauf bezüglichen Werk* (in German), *Le droit international dans l'histoire du Japon* (in French), *La neutralité du Japon pendant la Guerre franco-allemande* (in French), *Hostilités entre la France et la Chine en* 1884–5, *et Étude des lois de Neutralité au Japon pendant ces Hostilités* (in French), *International Law Applied to the Russo-Japanese War* (in English), and—in Japanese—*Public International Law in War, Treatise on International Law, Public International Law in Peace, Principles of International Law*, and *Digest of International Law in War*.

INAZO NITOBÉ.

LIST OF INTERNATIONAL AGREEMENTS (JANUARY 1, 1920–MAY 31, 1921).

[This list is unofficial, and almost certainly incomplete, as some engagements to which Great Britain is not a party are only incidentally reported to this country. The date is that of the signature, and not of the ratification of the instrument.]

1920.

Date	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
3 Jan.	Argentine	France	Denunciation and renewal	of 1892 Commercial Treaty.
4 Jan.	Hungary	Allied and Associated Powers.	Treaty	Peace.
8 Jan.	Serb-Croat-Slovene State	U.K., France	Agreement	Financial advances.
10 Jan.	Germany	Allied and Associated Powers	Ratification	of Treaty of Versailles.
10 Jan.	Czecho-Slovakia	General	Accession	to International Telegraph Union.
24 Sept. (1919) 10 Jan.	U.K.	France	Exchange of Notes	Debts of enemy businesses in liquidation.
15 Dec. (1919) 10 Jan.	U.K.	France	Agreement	Telephones
22 Jan.	U.K.	Roumania	Agreement	1916 Contracts with Roumanian Corn Bureau.
22 Jan.	Belgium	Portugal	Declaration	Commercial relations (Portuguese wines).
2 Feb.	Esthonia	Russia	Treaty	Peace.
7 Feb.	Austria	Poland	Agreement	Property of Austrian and Polish Nationals in other States' territory.
8 Feb.	India	General	Accession	to 1904 White Slave Traffic Convention.
9 Feb.		General	Treaty	Spitsbergen.
9 Feb.	France	Germany	Notification	of revival of bilateral Treaties under Art. 289 of Treaty of Versailles.
11 Feb.	U.K.	Muscat	Prolongation	of 1891 Commercial Treaty.
12 Feb.	U.K.	Russia	Agreement	Exchange of prisoners.
4/18 Feb.	U.K.	Switzerland	Additional Agreement and Regulations	Exchange of postal parcels.
19 Feb.	France	Italy	Declaration	Application of 1919 Emigration and Immigration Treaty to Italian workmen in Alsace-Lorraine.
30 Jan. 27 Feb.	U.S.A.	Sweden	Agreement	Copyright.

NOTE.—A supplementary list, containing agreements omitted from the list in Vol. I., will be found on p. 221 *infra*.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
29 Feb.	South American States		Draft Convention	Social Defence and Police co-operation.
1 March	France	Germany	Convention	Port of Kehl.
3 March	France	Germany	Convention	Pensions in Alsace-Lorraine.
8 March	Belgium	Netherlands	Arrangement	Telegraphs.
10 March	France	Switzerland	Agreement	Imports.
16 March	Italy	Switzerland	Agreement	Workmen's unemployment benefit.
16 March	Germany	Switzerland	Renewal	of 1904 Commercial Treaty.
16 March	Poland	General	Accession	to 1886 Berne Copyright Convention.
19 March	Canada	France	Denunciation	of 1909 Commercial Convention.
20 March	Czecho-Slovakia	France	Convention	Emigration and immigration.
21 March	U.K.	Persia	Agreement	Commerce and tariffs.
22 March	Esthonia	Latvia	Convention	Arbitration.
23 March	U.K.	Liberia	Termination	of 1913 Agreement (Navigation of Manoh River).
25 March	France	Greece, Italy, Switzerland	Convention	Coins of "Latin Union."
20/25 March	France	Germany	Exchange of Notes	Private property under Arts. 297–305 of Treaty of Versailles.
26 March	Argentine	Italy	Convention	Accidents to workmen.
26 March	Sweden	Chile	Convention	Peace Commission.
27 March	Persia	General	Accession	to 1919 Arms Traffic Convention.
29 March	France	Canada	Denunciation	of 1907 and 1909 Commercial Conventions.
31 March	Sweden	Germany	Prolongation	of 1911 Commercial Treaty.
5 April	U.K.	Bolivia	Convention	False indications of origin.
13 April	Danzig	Poland	Agreement	Food supply at Danzig.
13 April	Netherlands	U.K.	Treaty	Application of 1898 Extradition Treaty to Protected Malay States
17 April	France	General	Ratification	of 1913 Brussels Commercial Statistics Convention.
17 April	Equator	General	Accession	to 1912 Radiotelegraph Convention.
19 April	Germany	Russia	Agreement	Repatriation of prisoners.
20 April	Germany	Latvia	Agreement	Exchange of prisoners.
22 April	Czecho-Slovakia	General	Accession	to 1906 Rome Postal Union Convention.
23 April	Czecho-Slovakia	General	Accession	to 1912 Radiotelegraph Convention.
23 April	Belgium	Chile	Convention	Census Population Statistics.
24 April	U.K.	France	Arrangement	Petroleum.
26 April	U.K.	France	Convention	French Loge at Balasore.
1 May	South Africa	General	Accession	to 1908 Copyright Convention and 1914 Additional Protocol.
13 Oct. (1919) / 1 May	U.K.	General	Convention and Additional Protocol	Regulation of Air Navigation.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
19 March / 1 May	Greece	Japan	Denunciation and Renewal	of 1899 Commercial Treaty.
5 May	France	Germany	Convention	Industrial questions in Alsace-Lorraine.
8 May	Czecho-Slovakia	General	Accession	to 1890 Brussels Convention (Publication of Customs Tariffs).
8 May	Germany	Hungary	Agreement	Transport of prisoners.
10 May	Finland	Sweden	Exchange of Notes	Timber on Tornen and Muonio rivers.
31 Oct. (1919) / 10 May	Costa-Rica	Austria	Exchange of Notes	Establishment of official relations.
11 May	Netherlands	Venezuela	Treaty	Resumption of diplomatic relations.
11 May	Germany	Netherlands	Treaty	Credit to Germany and export of coal to Netherlands.
11 May		Denmark Norway Sweden	Supplementary article	" 1873 and 1875 Coinage conventions.
18 May	Czecho-Slovakia	Germany	Agreement [1]	Execution of articles of Peace Treaty.
19 May	France	Germany	Protocol	Importation of Alsace-Lorraine products into Germany.
26 May	Portugal	General	Ratification	of 1913 Brussels Commercial Statistics Convention.
1 June	U.K.	Netherlands	Renewal	of 1905 Arbitration Convention.
5 June	U.K.	France	Denunciation	of 1902 Seychelles Convention.
8 June	France	Portugal	Convention	Importation and exportation.
11 June	Persia	China	Treaty	Future relations.
22 June	Peru	General	Ratification	of 1919 International Air Convention and 1920 Additional Protocol.
26 April / 23 June	U.K.	China	Agreement	Money orders.
18 29 June	U.S.A.	Sweden	Denunciation	of Arts. 11 and 12 of 1910 Consular Convention.
29 June	Finland	General	Accession	to International Telegraph Union.
30 June		General	Agreement [2]	Preservation of Industrial Property affected by the war.
30 June	Uruguay	General	Accession	to 1910 White Slave Traffic Convention.
1 July	France	Germany	Provisional Arrangement	Bridges on the Rhine.
24 Dec. (1918) / 2 July	U.K.	Switzerland	Extension	of 1880 Extradition Treaty to Protected Malay States.

[1] Ratified with effect from October 20, 1920.

[2] Accessions: Sweden, September 7; U.K., August 31–September 9; Spain, October 6; Brazil, October 9; Austria, October 27; Japan, November 17; Ceylon and Trinidad, November 25; Norway, November 27; Tunis, December 30; Denmark, January 22, 1921; New Zealand, January 25; Serb-Croat-Slovene State, February 26; Belgium, March [illegible]

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
5 July	Denmark	Principal Allied and Associated Powers	Treaty	Slesvig.
5 July	France	Morocco	Supplementary Convention	to 1913 Postal Convention (Moroccan telegraphs and telephones).
5 July	U.K.	Portugal	Agreement	Boundaries of Angola.
18 June / 6 July	U.K.	Norway	Additional Agreement	to 1900 Agreement (Exchange of Postal Parcels).
7 July	Germany	Russia	Arrangement	Repatriation of prisoners.
8 July	Italy	Germany	Notification	of revival of bilateral Treaties under Art. 289 of Treaty of Versailles.
8 July	U.K.	Japan	Declaration	Anglo-Japanese Alliance and League of Nations.
9 July	Japan	Germany	Notification	of revival of bilateral Treaties under Art. 289 of Treaty of Versailles.
29 June / 3/14 July	Norway	Finland	Exchange of Notes	Fisheries at the Tana watercourse.
15 July	Germany	Latvia	Preliminary Agreement	Resumption of relations.
16 July	Principal Allied and Associated Powers	Austria	Protocol	Reservation of Allies' rights in case of non-execution of Armistice clauses of Treaty of St. Germain.
18 July	Principal Allied and Associated Powers [1]		Award	Frontiers of Teschen.
20 July	U.K.	Esthonia	Exchange of Notes	Commercial Relations.
24 July	Belgium	France	Convention	Application of Art. 296 (Paragraph F) of Treaty of Versailles.
28 July	Poland	Principal Allied and Associated Powers	Decision [1]	Polish and Czecho-Slovak frontiers at Teschen.
31 July	British Empire, Belgium	General	Ratification	of 1919 Liquor Traffic (Africa) Convention.
31 July	British Empire, Belgium	General	Ratification	of Convention of Sept. 10, 1919, revising Berlin General Act.
2 Aug.	Germany	Latvia	Temporary Agreement	Future Relations.
19 May / 5 June / 2 Aug.	Sweden	General	Withdrawal	from 1912 International Sugar Convention.
3 Aug.	France	Austria	Convention	Austrian debts under Art. 248 of Treaty of St. Germain.
4 Aug.	Netherlands	General	Denunciation	of 1902 Brussels Sugar Convention.
5 Aug.	Principal Allied and Associated Powers.		Decision [1]	Teschen, Spisz, and Orava.
2 July / 7 Aug.	Germany	Luxemburg	Arrangement	Telegraphic communication.

[1] Decision of Ambassadors' Conference.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
9 Aug.	Allied and Associated Powers	Bulgaria	Deposit of Ratifications.	of Treaty of Neuilly.
9 Aug.	Allied and Associated Powers.	Bulgaria	Protocol	Reservation of Allies' rights in case of non-execution of Armistice Clauses of Treaty of Neuilly.
10 Aug.	U.K., France Italy	Turkey	Treaty	Tripartite spheres of influence.
10 Aug.	Principal Allied and Associated Powers.		Treaty	Minorities (Armenia)—Protection of inhabitants, trade, transit, etc.
10 Aug.	Principal Allied and Associated Powers	Greece	Treaty	Transfer of Thracian territories and Bulgarian economic outlets on Aegean Sea.
10 Aug.	Principal Allied and Associated Powers	Greece	Treaty	Protection of minorities, trade, transit, etc.
10 Aug.	Principal Allied and Associated Powers	Poland, Serb-Croat-Slovene State Czecho-Slovakia	Treaty	Sovereignty over territories.
10 Aug.	Russia	Armenia	Agreement	Suspension of hostilities.
11 Aug.	U.K.	Roumania	Agreement	Compensation for wartime destruction of oil wells.
11 Aug.	Russia	Latvia	Treaty	Peace.
13 Aug.	Venezuela	General	Accession	to 1912 Radiotelegraphic Convention.
14 Aug.	Czecho-Slovakia	Serb-Croat-Slovene State.	Treaty	Alliance.
6 July 20 Aug.	U.K.	Denmark	Additional Agreement	Parcels marked for collection of trade charges.
24 Aug.	Belgium	Germany	Notification	of revival of bilateral Treaties under Art. 289 of Treaty of Versailles.
26 Aug.	Roumania	General	Accession	to 1883 Industrial Property Convention.
26 Aug.	Roumania	General	Accession	to International Trade-mark Conventions 1891, 1900, 1911.
30 Aug.	Danzig	General	Agreement	High Court of Justice for Danzig and Memel.
31 Aug.	Czecho-Slovakia	Austria	Agreement	Post War legal position of businesses.
31 Aug.		Esthonia Finland Latvia Lithuania Poland Ukraine	Treaty *ad referendum*	Future relations.
1 Sept.	Belgium	General	Withdrawal	from 1912 International Sugar Convention.
1 Sept.	Saar Territory	General	Accession	to International Telegraph Union.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
1 Sept.	China	General	Accession	to 1912 Radiotelegraphic Convention.
1 Sept.	Germany	Austria	Agreement and Protocol.	Finance.
2 Sept.	Portugal	U.K.	Award	in Religious Orders' Properties Arbitration.
4 Sept.	France	Bulgaria	Notification	of renunciation of faculty under Art. 176 (paragraph E) of Treaty of Neuilly.
22 Aug. / 4 Sept.	U.K.	Greece	Agreement	Suppression of capitulations in Egypt.
6 Sept.	U.K.	Denmark	Exchange of Notes	Recognition of Danish sovereignty over Greenland.
7 Sept.	France	Belgium	Convention	Military.
9 Sept.	Saar Territory	General	Accession	to 1906 Rome Postal Union.
9 Sept.	Danzig	Poland	Agreement	Food supply of Danzig.
11/12 Sept.	France	Italy	Exchange of Notes	Telegraphic rates.
14 Sept.	Germany	Switzerland	Provisional Convention	Air navigation.
14 Sept.	U.S.A.	Portugal	Prolongation	of 1908 Arbitration Convention.
10/15 Sept.	France	Belgium	Exchange of Notes	approving Military Convention of 7 Sept.
16 Sept.	U.K.	France	Notification	of modification of tariff provisions of 1900 Telegraphic Convention.
4 Aug. / 22 Sept.	Czecho-Slovakia	Serb-Croat-Slovene State	Convention	Future relations and defence.
25 Sept.	Austria	General	Renewed adhesion	to 1883 Industrial Property Convention.
28 Sept.	Latvia	Lithuania	Convention	Arbitration.
17 July / 30 Sept.	Morocco (French zone)	General	Accession	to 1906 Rome General Postal Union Convention.
30 Sept.	Mozambique	Nyasaland	Agreement	Postal.
1 Oct.	Morocco (Spanish zone)	General	Accession	to 1906 Rome General Postal Union Convention.
1 Oct.	Austria	General	Accession	to 1908 Copyright Convention and 1914 Additional Protocol.
2 Oct.	China	Russo-Chinese Bank	Agreement	Chinese Eastern Railway.
7 Oct.	General		Protocol	of Deposit of Ratifications of 1912 Paris Sanitary Convention.
11 Oct.	Peru	Germany	Notification	of revival of bilateral Treaties under Art. 289 of Treaty of Versailles.
12 Oct	Poland	Russia	Agreement and Treaty	Armistice and preliminaries of peace.
14 Oct.	Poland	General	Accession	To Hague Peace (Arbitration) Conventions.
14 Oct.	Norway	Portugal	Exchange of Notes	Commerce and navigation.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
20 Oct.	Greece	Austria	Notification	of revival of bilateral treaties.
21 Oct.	Danzig	Sweden	Provisional Agreement	Danzig ships' navigation of Swedish waters.
22 Oct.	Argentine	U.S.A.	Treaty	Commercial Travellers.
23 Oct.	Denmark	Germany	Agreement	Frontier traffic.
27 Oct.	Germany	Principal Allied and Associated Powers	Decision [1]	constituting Danzig a free town.
27 Oct.	U.K., India	General	Accession	to 1920 International Refrigeration Convention.
28 Oct.	Roumania	Poland, etc.	Accession	to "Sovereignty" Treaty of 10 Aug.
28 Oct.	Roumania	Principal Allied and Associated Powers.	Treaty	Union of Bessarabia with Roumania.
4 Nov.	France	Czecho-Slovakia	Convention	Goods traffic.
10 Nov.	Liechtenstein	Switzerland	Convention	Posts, telegraphs, telephones.
11 Nov.	Italy	Luxemburg	Treaty	Labour and industrial questions.
12 Nov.	Italy	Serb-Croat-Slovene State	Agreement (of Rapallo)	Friendship, Territory, etc.
13 Nov.	Spain	America [3]	Convention	Postal.
18 Nov.	Danzig	Poland	Treaty	Art. 104 of Treaty of Versailles.
19 Nov.	Poland	General	Accession	to 1886 Brussels Convention (Exchange of official publications).
23 Nov.	U.K.	France	Agreement	Air Navigation.
24 Nov.	France	Austria	Notification	of revival of bilateral treaties.
22, 25 Nov.	France	Sweden	Renewal	of 1890 Berne International Convention (Transport of goods by rail).
29 Nov.	Monaco	General	Accession	to 1912 International Sanitary Convention.
9 Dec.	Poland	General	Accession	to 1890 Brussels Convention (Publication of customs tariffs).
9 Dec.	U.S.A.	Denmark	Proclamation	Re-establishment of copyrights lost during the war.
22 April 14 Dec.	U.K.	France	Agreement	Ultimate disposal of enemy tonnage.
15 Dec.	Denmark	Principal Allied and Associated Powers.	Deposit of Ratifications	of Slesvig Treaty of 5 July, 1920.

[1] Decision of Ambassadors' Conference.
[2] To come into force February 1, 1921.
[3] *i.e.* U.S.A., Argentine, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Hayti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Salvador, Uruguay, Venezuela.

Date (1920).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
15/16 Dec.	Germany	Sweden	Denunciation	of 1911 Commercial Treaty.
16 Dec.	Denmark	General	Ratification	of 1914 London Convention for safety of life at sea.
17 Dec.	Poland	General	Accession [1]	to International Telegraph Union.
17/18 Dec.	Spain	Sweden	Denunciation	of 1892 Commercial Convention.
22 Dec.	Italy	Venezuela	Protocol	Italian claims.
23 Dec.	U.K.	Denmark	Agreement	Air Navigation.
23 Dec.	Italy	General	Accession	to 1906 White Phosphorus Convention.
29 Dec.	South Africa New Zealand Canada	General	Accession	to 1920 International Refrigeration Convention.
30 Dec.	Bulgaria	Netherlands	Notification	of most-favoured-nation treatment.
31 Dec.	Finland	Russia	Treaty	Peace.
31 Dec.	Sweden	General	Ratification	of Protocol and Statutes of Permanent Court of International Justice.
31 Dec.	Nicaragua	General	Accession	to 1919 International Air Convention.

1921

4 Jan.	Netherlands	Spain	Denunciation	of prolongation of 1892 and 1899 Commercial Declarations.
7 Jan.	China	General	Accession	to International Telegraph Union.
8 Jan.	Danzig	Poland	Provisional Agreement	renewing Agreements of of 13 April and 9 Sept.
24 Dec. (1920) 12 Jan.	Germany	Luxemburg	Convention [2]	Money orders.
29 Dec. (1920) 12 Jan.	Germany	Luxemburg	Convention [2]	Parcels post.
14 Jan.	Poland	General	Accession	to Berne 1906 Convention on night labour for women.
31 July (1919) 14 Jan.	Poland	General	Accession	to 1906 White Phosphorus Convention.
8 Dec. (1920) 18 Jan.	U.K.	Netherlands	Agreement	Telegraphic correspondence by direct submarine cables.
19 Jan.		Costa Rica Guatemala Honduras Salvador	Treaty	Pact of Union.

[1] The Accession previously recorded, of March 18, 1919 (see *British Year Book of International Law*, Vol. I. p. 237) was provisional, having been notified by the Polish National Convention.
[2] Supplementary to the 1878 Postal Convention.

Date (1921).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
21 Jan.	Netherlands	General	Accession	to Art. 354 of Treaty of Versailles.
26 Jan.	Allied and Associated Powers	Esthonia	Decision [1]	Recognition of Esthonia as a State *de jure*.
29 Jan.	Canada	France	Provisional Agreement	Commerce.
28/30 Jan.	China	Japan	Exchange of Notes	Cancelling military pact of Feb. 5, 1919.
4 Feb.	Morocco (Spanish Zone)	General	Accession	to 1907 Rome Agreement (International Office of Public Health).
8 Feb.	Italy	Serb-Croat-Slovene State Czecho-Slovakia	Treaty (of Rapallo) [2]	Future relations.
16 Feb.	Spain	General	Accession	to 1912 International Opium Convention and 1914 Protocol.
16 Feb.	U.K.	Sweden	Provisional Agreement	Air Navigation.
17 Feb.	Belgium	Austria	Notification	of revival of 1881 Extradition Convention.
17 Feb.	Belgium	Austria	Notification	of revival of 1871 Death Certificate Agreement.
17 Feb.	U.K.	Argentine	Denunciation	of 1884 Postal Packet Agreement.
16/18 Feb.	Spain	Italy	Denunciation	of 1914 Commercial Convention.
18 Feb.	France	Poland	Agreement	Political and economic.
21 Feb.	Poland	General	Accession	to 1910 White Slave Traffic Convention.
22 Feb.	Czecho-Slovakia	General	Accession	to 1908 and 1914 Copyright Conventions.
22 Feb.	Venezuela	General	Accession	to International Telegraph Union.
26 Feb.	Serb-Croat Slovene State	General	Accession	to 1883 Industrial Property Convention.
10 April (1920)/27 Feb.	Sweden	General	Accession	to 1906 White Phosphorus Convention.
28 Feb.	Russia	Afghanistan	Treaty	Friendship and future relations.
28 Feb.	Czecho-Slovakia	General	Accession [3]	to 1909 International Automobile Convention.
28 Feb./1 March	Belgium	Bulgaria	Notification	Revival of 1908 Extradition Convention.
4 March	Newfoundland	General	Accession	to 1912 International Sanitary Convention.
5 March	Belgium	General	Accession	to 1914 Additional Protocol of 1908 Copyright Convention.
8 March	Spain	Esthonia	Exchange of Notes	Recognition of Esthonia as a State *de jure*.

[1] Decision of Inter-Allied Conference.
[2] Cf. also Nov. 12, 1920.
[3] With effect from May 1, 1922.

Date (1921).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
9 March	France	Turkey (Angora Government)	Agreement	Frontiers of Turkey and Syria.
10 March	Esthonia	General	Accession	to 1906 Geneva Red Cross Convention
10 March	Poland	General	Accession	to 1912 Radiotelegraphic Convention.
11 March	Poland	General	Accession	to 1911 Convention for suppression of obscene publications.
14 March	U.K.	Bolivia	Additional Act	to Convention of 5 April, 1920.
14 March	Belgium	General	Accession	to Industrial Property Preservation Agreement of 30 June 1920.
14 March	Colombia	General	Accession	to 1920 Madrid Postal Convention
16 March	U.K.	Russia	Agreement	Trade.
18 March	Poland	Russia	Final Treaty	Peace.
15/19 March	Spain	Italy	Prolongation [1]	of 1914 Commercial Agreement.
19 March	Spain	Switzerland	Prolongation [1]	of 1906 Commercial Treaty.
19 March	Spain	Denmark	Prolongation [1]	of 1892 Commercial Convention.
19 March	Spain	Sweden	Prolongation [1]	of 1892 Commercial Convention.
20 March	Spain	Netherlands	Prolongation [2]	of 1892 Commercial Declaration.
23 March	Austria	General	Accession	to 1906 White Phosphorus Convention.
23 March	Italy	Czecho-Slovakia	Treaty and Agreements	Commerce, economics, navigation, traffic facilities.
26 March	Hungary	General	Accession	to Industrial Property Preservation Agreement of 30 June, 1920.
25/29 March	France	Saar Territory	Agreement	Posts, telegraphs, telephones.
29 March	Greece	General	Accession	to 1886 Berne Copyright Convention as revised in 1908.
30 March	Czecho-Slovakia	General	Accession	to 1906 White Phosphorus Convention.
30 March	Siam	General	Ratification	of 1919 Small Arms Traffic Convention and Protocol.
2 April	Roumania	Netherlands	Denunciation [3]	of 1899 Commercial Agreement.
4 April	Roumania	Spain	Denunciation	of 1908 Commercial Agreement.
4 April	Roumania	Switzerland	Denunciation	of 1893 and 1904 Commercial Conventions.
7 April	France	Czecho-Slovakia	Exchange of Notes	Reciprocal communication of births, deaths and marriages.
16 April	Roumania	Spain	Denunciation [3]	of Commercial Treaty.

[1] All for short periods—mostly of three months each. [2] For a short period of three months.
[3] With effect one year from date.

Date (1921).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
21 April	Germany	Poland	Convention	Traffic (under Art. 98 of Treaty of Versailles).
22 April	U.K.	Norway	Agreement	Suppression of Capitulations in Egypt.
23 April	Roumania	Czecho-Slovakia	Convention	Commerce.
23 April	Roumania	Czecho-Slovakia	Convention	Political and military alliance.
23 April	France	Norway	Convention	Commercial.
29 April	Luxemburg	General	Accession	to 1920 Madrid Postal Convention.
9 May	Belgium	General	Accession	to Protocol of Permanent Court of International Justice.
19 May	France	Russia	Denunciation	of 1874 Consular and Property Conventions.
23 May	Australia	General	Accession	to 1912 International Sanitary Convention.

SUPPLEMENT TO 1919 LIST IN VOL. I. OF "THE BRITISH YEAR BOOK OF INTERNATIONAL LAW."[1]

8 Feb.	U.S.A.	Panama	Convention	Commercial Travellers.
11 Feb.	Greece	Belgium	Denunciation	of 1904 Commercial Agreement.
12 Feb.		Denmark Norway Sweden	Declaration	Workmen's Compensation for accidents.
19 Feb.	Greece	Spain	Denunciation	of 1903 Commercial Convention.
13 March	Poland	General	Accession	to 1906 Rome Postal Union Convention.
16 May	Chile	Mexico	Convention	Diplomatic pouches.
28 May		Denmark Norway Sweden.	Declaration	Transit of expelled aliens.
30 May	Sweden	General	Accession	to 1908 Copyright Convention.
16 June	U.K. U.S.A. France	Belgium	Agreement	Reimbursement by Germany to Belgium of sums borrowed up to Nov. 11, 1918.
24 March 27 June	Greece	Sweden	Denunciation and provisional renewal	of 1852 Commercial Convention.
17 July	France	U.S.A.	Agreement	modifying Art. 8 of 1822 Commercial Convention.
30 June 6 Aug.	Spain	Sweden	Provisional renewal	of 1892 Commercial Agreement and Convention.
9 Aug.	Mexico	Nicaragua	Convention	Diplomatic correspondence.
3 Sept.	France	Poland	Convention	Emigration and immigration.
8 Sept.	U.K.	France	Supplementary Convention	Wadai-Darfur boundary.
12 Sept.	Italy	France	Agreement	Tripoli frontier and interests in Africa.

[1] *British Year Book of International Law*, Vol. I. pp. 237 *seq.*

Date (1919).	Country or Countries.	Other Contracting Parties.	Nature of Instrument.	Subject of Instrument.
15 Sept.	Iceland	General	Accession	to 1906 Rome Postal Union Convention.
13 Oct.	France	U.K., U.S.A.	Ratification	of Treaty of June 28, 1919, Assistance in case of unprovoked aggression by Germany.
20 Oct.	U.S.A.	Paraguay	Convention	Commercial travellers.
7 Nov.	U.S.A.	Paraguay	Agreement	International Clearing Fund.
29 Oct. / 14 Nov.	U.K.	Netherlands	Agreement	Conveyance of Mails by Aeroplane.
3 Dec.	China	Bolivia	Treaty	Peace and Friendship.
6 Dec.	U.K.	Switzerland	Provisional Convention	Air navigation.
9 Dec.	France	Switzerland	Provisional Convention	Air navigation.
17 Dec.	Uruguay	General	Ratification	of first Convention of 1910 Pan-American Conference.

REVIEWS OF BOOKS

International Law and the Great War. By J. W. Garner. 2 vols. 1920. London: Longmans, Green & Co.

In these two very important volumes Professor Garner has successfully accomplished the task of setting forth and co-ordinating those incidents in the recent war which are of interest and value to the international lawyer. To whatever school of the theoretic side of international law we may belong, whether it be Naturalist, Grotian, or Positivist, it cannot be seriously disputed that the deliberate practice of States in matters of international action constitutes, at the very lowest, a most important source of international law. A new rule of law may grow up under our eyes; for in the development of practice the law is being made. How far the practice of the belligerent States in the recent war is likely to add to, or modify, to any substantial extent, the rules of land and sea warfare as we know them, it is perhaps too early to attempt to estimate. But of one thing there can be little doubt. It was of urgent necessity to the international lawyer that he should be able to have recourse to an accurate and orderly account of the practice of States during a time when hardly one of the settled and accepted doctrines of the law was not challenged by one side or the other. Professor Garner has performed a supreme service. In these two important volumes he has covered the whole field. He deals with the diplomatic position created by the outbreak of war, the practice of the belligerents in regard to the private property of enemy subjects in their territory, the practice in regard to the law of warfare on land and on the sea, and with the difficult questions raised by the relation of belligerents to neutrals and, in this country in particular, the frequent subject of argument and of adjudication in the Prize Court; see, for example, the great cases of the *Kim*, the *Leonora*, the *Zamora*, and others.

It is obvious that in dealing with the practice of the belligerents in warfare on land, the author is moving in a region in which it is all too easy to be swayed by considerations which should have no place whatsoever in the work of any one who puts forward serious claims as a student of, or an authority upon, international law. This is a very high test, and one which not all have successfully passed. But Professor Garner has comported himself admirably in this the most delicate part of his task. His treatment of the German occupation of Belgium, for example, is full, exact, and wholly judicial in its survey. Especially sound is the chapter on "War Criminals," and their position in international law, and it possesses a peculiarly practical interest at the time of writing. In summing up his general conclusions (Vol. II. p. 499) the author goes to the heart of the matter and discusses, in the light of the attitude of the neutral States at the beginning of the war, how far the generally accepted view that a breach of neutrality, such as the violation of Belgian territory by Germany, is a wrong only *quoad* Belgium and the other parties to the neutrality-giving

convention, is correct. He urges—in the view of the writer of this notice, wrongly—that the whole of the society of nations becomes thereby implicated and is possessed of a right and a duty to interfere, whether by deed or by protest, and on this reasoning attacks the late President of the United States for his attitude of diplomatic correctitude in the face of invitations from Belgium to denounce the German occupation. If Professor Garner's view, which is, briefly, that the wrong to one State is a wrong to all, is correct, all neutrality would disappear, and neutrals would be expected at the beginning of a war to make up their minds at once and take sides upon a purely political question bristling with difficulties, with assertions and counter-assertions, the ultimate rights and wrongs of which only history can decide. If X fails to supply me with the barley which he has contracted to deliver, or if he wrongfully enters upon my land, he is a wrongdoer *quoad* me, and I do not expect the neighbours to come rushing to my assistance and support. When X does some act which amounts to that elusive and indefinable thing called a "crime," then it may be time to summon the *posse comitatus*, but not before. Neutrality is a necessity in international law (saving, always, the hope, that an effective League of Nations may make illusory the old distinction between belligerents and neutrals), because in the absence of a distinction between torts and crimes, between civil and criminal offences, all offences or acts which are wrongful according to that law can be placed no higher than acts wrongful *quoad* the State immediately affected.

It will be, perhaps, a kindness to Professor Garner if he is told that, although nothing could spoil this very learned and admirable work, a large number of minor inaccuracies detract somewhat from its reliability. The following is a representative selection: Mr. Justice *Swinfen*, I. 247; *Judge* G. G. Phillimore, I. 242; *Court of Appeal*, where House of Lords is clearly meant, I. 73; *Sir* Robert Cecil, II. 342.

CYRIL M. PICCIOTTO.

Traité de Droit International Public, par Paul Fauchille. Huitième édition, entièrement refondue, complétée et mise au courant du *Manuel de droit international public* de M. Henry Bonfils. Tome ii. (Guerre et Neutralité). 8vo., pp. xii., 1095. 1921. Paris: Librairie Arthur Rousseau. (35 fr.).

This is a treatise to be published in two volumes based on the Manual of the late M. Bonfils, the last edition of which appeared in 1914. M. Fauchille, in his Preface, points out that the changes and additions to the original work of M. Bonfils are so numerous and important that it is, in effect, a new work, and the size and completeness of the treatment of the topics dealt with justify him in describing it no longer as a Manual, but as a "Treatise." At present only the second volume has appeared, but the first volume is now in the press.

The author asks for as sympathetic a reception of this new work as was given to the previous seven editions of the Manual. He may rest assured on that head. It is a remarkable contribution to the literature of international law, and one to which every serious student will turn for assistance in discussing the events of the recent years of war.

To deal adequately with the many topics which are discussed in the light of the war of 1914–19 would require more space than is at our disposal. The long story of the violations of the laws of war by the Central Powers loses nothing of its seriousness in the treatment of M. Fauchille. The author devotes some pages to the consideration of the question of the applicability of the Geneva and Hague Conventions in cases where some of the belligerents are not parties to the latter, but are bound by the former. He is of opinion that where the latter are not in force, the former remain binding, and that the acceptance of the latter Conventions was not a renunciation of the former. In dealing with the Sixth Convention we do not find a reference to the decision of the English Prize Court in the case of the *Marie Leonhardt*.

The subject of belligerents arming defensively their merchant ships is very fully dealt with in § 1319, as well as the legality of the arming by neutrals to resist illegal operations by belligerents (§ 1672). On the subject of search of merchant ships in port, the author approves of the practice which became the rule during the late war, and cites cases from the English, French and German Prize Courts in which the legality was recognised (§ 1406).

The chapters on "Liberté commerciale des neutres," "Contrebande de guerre," and "Blocus," which cover some 200 pages, are the most important examination of these thorny questions which has at present appeared. The author points out wherein the so-called "blockade" of the Central Powers in the late war by Great Britain and France differed from blockade as it had hitherto been understood by international lawyers. His conclusion as to the future of blockade is that blockade of the old type under the conditions of modern war is no longer capable of being carried into execution. He foresees that future blockades will partake of the type introduced by the Allies; that there will be two forms: *indirect*, carried out by war zones or mined areas, and *direct*, by means of ships. But he raises the question whether blockade of the most extended type has not lost much of its effect by reason of the development of aerial navigation. The question is one of the most important in the whole of the law of naval warfare. Decisions of British Prize Courts afford no help in its solution, by reason of the fact that the British Retaliatory Orders in Council were upheld on the ground of the legality of retaliatory measures in the circumstances, and not as extensions of the law of blockade.

Part VI of this work is a short chapter on "Le droit international dans l'avenir," and in it the author expresses himself in guarded terms. His conclusions as to the effect of the League of Nations are framed in the form of questions. He sees, however, in the penal clauses of the Treaties of Peace the introduction of a new procedure which he urges should be rendered of general application. He desires a convention to which all States are parties, which shall provide for the erection of a court, composed of belligerents and neutrals, before which all persons accused of violating the laws of war can be brought, a court which shall be able to adjudge the wrong-doers to suffer the extreme penalty.

In conclusion, the author lays great stress on the importance of emphasising the influence of morality in all international dealings.

A. Pearce Higgins.

Le droit pénal international et sa mise en oeuvre en temps de paix et en temps de guerre, par Maurice Travers, Avocat à la Cour de Paris, etc. Tome i. 1920. Paris: Librairie de la Société du Recueil Sirey. 8vo. 667 pp. (30 fr.).

This important and interesting work deals mainly with the question as to the tests on which local jurisdiction in criminal matters ought to depend, and incidentally with the several methods of international co-operation with reference to the administration of Criminal Law.

The question as to the grounds of jurisdiction has given rise to much controversy, but it is generally admitted that the Criminal Courts of a State ought to have jurisdiction in respect of acts which have been committed within the territory of such State, and which according to the law of that State constitute criminal offences, no distinction being made in that respect between the subjects of the country concerned and aliens. The jurisdiction as to acts committed outside of the territory by the subjects of the State claiming jurisdiction, is also generally admitted, but subject to certain qualifications as to the possible conflict of laws in such cases. There are finally certain special classes of offences as to which, according to the laws of most States, the jurisdiction depends neither on the place where the offence was committed nor on the nationality of the accused (*e. g.* piracy, offences analogous to high treason, coinage offences, etc.). Mr. Travers also considers two other grounds of jurisdiction, namely: (1) the nationality of the victim of a criminal act, (2) the presence of the accused within the territory of the State claiming jurisdiction. But the classes of cases which he brings under the first head are all cases where the jurisdiction may also be ascribed to the special nature of the offence, and the mere presence of the accused within the territory of the State claiming jurisdiction is not generally admitted as a ground of jurisdiction (see on this point the passage from Hall, seventh edition, p. 222, quoted by Mr. Travers; and as to the view prevailing in France, see Mr. Travers' observations on p. 112).

As, however, the two last-mentioned grounds of jurisdiction are recognised as such, as well in the law of some countries as in the opinion of some well-known jurists, it is convenient to consider the subject under the five separate heads under which it is dealt with by Mr. Travers, namely: (1) the place of the act giving rise to the proceedings (*territorial* doctrine), (2) the special nature of the act giving rise to the proceedings (*universal* doctrine), (3) nationality of victim of act (*passively personal* doctrine), (4) nationality of accused (*actively personal* doctrine), (5) presence of accused within State where the proceedings are taken (*universal* doctrine).

Special tests of jurisdiction are established by certain international conventions referred to in the book under review, more particularly by the Treaty of Lima, entered upon between certain Central American and South American States (1878); the Treaty of Montevideo entered upon between certain South American States (1889); and the Conventions relating to the White Slave Traffic and to the Suppression of Obscene Publications, to which most European States and the Republic of Brazil are parties (1910).

International co-operation for the purpose of facilitating the administration of international law is, as mentioned above, referred to incidentally in the work

under review. The extradition treaties are the most obvious examples of such co-operation, but the book also deals with concurrent legislation as to particular offences (such as those dealt with by the two above-mentioned Conventions on the White Slave Traffic and Obscene Publications), with conventions facilitating the obtaining of evidence in foreign countries, mutual arrangements facilitating the observation of suspected persons, and with other similar methods by which the common interests of all countries in the prevention and repression of crimes are furthered.

The book is divided into three parts. The first part contains a lucid general statement as to the principles which, in the author's opinion, ought to govern the matter. The second part gives a comparative statement: (*a*) of projects of legislation on the subject brought forward by Dudley Field, Fiore, Wheaton and Halleck, and by the Resolutions of the Institute of International Law (passed in 1883 on the Report prepared by von Bar and Brusa), (*b*) a concise summary of the laws of various countries relating to local jurisdiction in criminal matters, (*c*) an elaborate investigation of the principles relating to the determination of jurisdiction in criminal matters, under the five heads indicated above, based mainly on an analysis of the provisions of French law relating to the subject, but with frequent references to other laws by way of comparison.

The third part of the work which will be contained in Vols. II. and III. is intended to give the rules as to the Conflict of Laws and as to the methods of international co-operation as established by positive law.

Where a prosecution in a Court belonging to a particular State is to be instituted by reason of the fact that the criminal offence was committed within the territory of such State, the question as to the actual place where the offence was committed must, of course, be solved in the first instance. The methods for the determination of the place of the commission of an offence may, of course, differ in different countries. The opinion held by Mr. Travers that on this point the *lex fori* must be decisive, will probably be shared by most jurists. Two classes of complications arise with reference to the ascertainment of the locality of the commission of a criminal offence. In the first place, the expression "territory" is always used in a somewhat wide sense, and the question what places ought to be deemed to belong to the territory of a particular State (*e. g.* territorial waters, ships, aircraft, etc.) therefore requires special consideration. In the second place, the question as to what locality ought to be deemed the locality of the commission of the offence is often the subject of controversy; the various acts constituting the offence are in many cases done in different places, and the object of a crime may be attained in a place other than the place or places in which such acts were done; it is, therefore, further necessary to determine at what time the action constituting a criminal offence must be deemed to have been completed; was it completed when the offender's acts were completed, or was it completed when those acts took effect? In the case of a conspiracy between persons resident in different countries, was the offence committed in each place where one of the conspirators contributed to the incriminated action, or was it committed in the place where such action took effect? These and similar questions, and the views formed thereon by distinguished jurists or given effect to by legislation or judicial decisions, are discussed in the work under review with great fulness and acumen.

Where jurisdiction is assumed as to an alleged offence committed outside of

the territory of the country in which the trial takes place, the question as to the law to be applied is another subject giving rise to controversy.

In the case of offences committed within the territory of the State in which the prosecution takes place, the exclusive applicability of the *lex fori* is universally admitted; as regards offences committed on foreign territory there is some difference of opinion. Mr. Travers gives a luminous and comprehensive summary of the various doctrines on the subject and of the several ways in which this matter is dealt with by positive law.

In most countries an offence committed outside of the territory (not being an offence of a specially excepted nature) cannot be made the subject of criminal proceedings unless it is punishable by the law of the country in which it was committed as well as by the *lex fori*. Under several systems of law offences involving imprisonment not exceeding a certain maximum duration under the law of the place of commission are also exempted from prosecution. It is also provided by the criminal law of some countries that the maximum penalty to which the particular offence is subject under the law of the place of commission must not be exceeded.

A conflict of laws may arise as to the evidence obtained in a foreign country. A very interesting illustration of this fact is given by Mr. Travers. Under French law it is unlawful for members of the medical profession to give evidence on matters confided to them by their patients. In the case of a prosecution for abortion alleged to have occurred in Switzerland, the French Court before whom the trial took place admitted the evidence of two Swiss physicians as to the condition of their patient, there being no rule of Swiss law against the taking of such evidence. The "Cour de Cassation," on the other hand, in a similar case, held that such evidence was not admissible. Mr. Travers' arguments against the reasoning of the last-mentioned judgment appear to be convincing to the present writer.

The opinions held by Mr. Travers on the various subjects dealt with by him are consistently based on his views as to the ultimate object of criminal law and procedure That object, in his opinion, is solely and exclusively the protection of the community against acts causing disturbances to its normal life. Professor Mendelssohn-Bartholdy, in his acute and learned monograph on the subject of Local Jurisdiction in Criminal Matters[1] (being probably the only important publication on the subject which is not referred to in Mr. Travers' work), attacks with great vehemence all authors who base their opinion as to the criterion for local jurisdiction upon any doctrine as to the ultimate object of criminal law, but the present writer does not see how any rational conclusions on the subject can be formed without reference to such a doctrine. A general statement as to the reasons which have led Mr. Travers to adopt the doctrine of the protection of the community, though not strictly belonging to the subject of his work, would have been valuable, more particularly as the doctrine of "retribution" is still very widely held by jurists as well as by the lay public.

Enough has been said to show the importance and interest of the subjects dealt with in the book under review, which is distinguished no less by the author's learning and critical skill than by the lucidity and elegance of his methods of expression.

[1] The monograph is a contribution to *Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts*. Allgemeiner Teil, Band VI. pp. 96–316.

The following criticisms are by no means intended to qualify this praise; they only proceed from the desire of inducing the author to increase the usefulness of future editions. Mr. Travers has unfortunately given way to the tendency, which is very common among continental authors, of taking too much trouble in refuting the opinions of others. Even where he agrees with the views of other writers he frequently argues against their reasons. It would, in the present writer's opinion, have been sufficient, in each case of controversy, to state the conflicting views in general terms together with the reasons for the author's own views, leaving it to the reader's judgment to form his own conclusions as to the merits of the dispute.

The somewhat excessive space given to matters of a comparatively trivial nature for the sake of completeness, is another matter which might be advantageously amended in future editions. The mutual arrangements made by countries adjoining one another for the avoidance of poaching, smuggling and other similar offences are not dependent on any general principles determining local jurisdiction in criminal matters, but are necessarily determined by the particular geographical, physical and industrial conditions of the regions involved, and their consideration appears unnecessary in a book which is mainly intended to deal with matters of principle. The voluminous character of the present edition is the only drawback to its usefulness.

The second volume (which appeared some time ago, but has not as yet reached the Editor of this Year Book) and the third volume, which will shortly appear, will be the subject of notice in the next number of this publication.

ERNEST J. SCHUSTER.

The American Supreme Court as an International Tribunal. By Herbert A. Smith. 1920. New York: Oxford University Press. Royal 8vo. pp. viii., 124. (9*s.* 6*d.* net.)

Prof. Herbert Smith's concise and accurate exposition will be most useful to readers who are interested in the problem of international justice, but, for want of learning or leisure or both, are unable to acquaint themselves at first hand with the decisions of the Supreme Court at Washington in controversies between States of the Union. He points out in the preface, very justly, that the history of what the American Supreme Court has done is not to be taken offhand as infallible prophecy or precept for what the Court of the League of Nations can or ought to do. "Nevertheless, this is the only permanent court . . . which has hitherto attempted in any degree to discharge the functions of a true international tribunal."

In point of form the two most important questions that can be asked about the authority of a court of justice concern the beginning and the end of a suit. What power has the Court to bring the parties before it? and, when it has heard and determined the cause, what means has it to execute the judgment? Accordingly, these questions have exercised many able minds with regard to the functions of a tribunal established for justice and judgment between independent nations. Experience, however, has shown that in point of substance a court may do very good work although its powers in one or both of these respects are indeterminate or their operation precarious. It is almost common

historical learning at this day that all civil jurisdiction was in its origin voluntary. The occasional tribunal of a freely chosen arbitrator gradually became a public and permanent court; even then a long time might pass before it acquired compulsory power, as we may see in the semi-historical Icelandic sagas. Executive authority to enforce the judgment when rendered was of yet later growth; in England it was feeble and often precarious down to the end of the Middle Ages. New courts and new judicial and administrative methods arose out of the need for calling in the King's extraordinary and undefined power to supplement the weakness of regular procedure, and our latest reconstruction has left the traces of this development still visible in the current forms and language of the law. It would, however, be a great mistake to suppose that there was no justice in the Middle Ages, or that the judgments of the Courts were without effect. Inasmuch as parties did, in fact, bring their suits at considerable trouble and expense, it is obvious that a judgment was on the whole worth having. When some good men, therefore, talk as if a Court could be of no use at all if there was ever any difficulty about compelling obedience to its decrees, they fly in the face of historical experience. That experience, moreover, shows that the power and influence of courts, once established, tends to increase if their business is done with even a moderate degree of integrity and efficiency.

Now the Supreme Court of the United States affords instructive examples of the manner in which a Court having imperfect means of coercion in its highest jurisdiction between States does in practice command respect and get its judgments obeyed. We say imperfect means only in comparison with the very complete powers exercisable at this day by the judges who do ordinary justice between citizens. The Supreme Court has its process and officers, and, as a matter of strict right, the President's duty to " take care that the laws be faithfully executed " entitles it to be supported at need by the whole strength of the Federal Government. But the States of the Union are not like ordinary citizens, and the political objections to an acute controversy between the Supreme Court and a State unwilling to be coerced are so grave that the Court has exercised great prudence, astuteness and patience to prevent matters from coming to such a point. As Prof. Herbert Smith says, often the Court appears rather to advise than to command.

Perhaps the most instructive example is the latest of all. In 1906 the State of Virginia sued the State of West Virginia, whose existence dates from 1863, to recover West Virginia's due proportion of the former public debt of the undivided commonwealth, and, after proceedings which, even having regard to the dignity of the parties, might be thought protracted, recovered final judgment in 1915. West Virginia, however, made no sign of any intention to satisfy this judgment, and (to pass over minor incidents) in 1917 Virginia applied for a writ of mandamus to the legislature of West Virginia to levy the amount required, and obtained a rule. On West Virginia's motion to discharge that rule, supported by an elaborate argument against the Court's jurisdiction to enforce its judgments against a State otherwise than by sequestration of existing property of the State available for the purpose (which in this case was none), the Supreme Court gave judgment in April, 1918 (246 U.S. 565). As matter of law the Court disallowed all West Virginia's objections. It had no doubt that some appropriate process could be found; it suggested (though it could

not, of course, then adjudge) that Congress had power to interfere by special legislation if necessary; but this without committing itself to denial that mandamus might be a proper remedy; the judgment, in short, certainly could and should be executed somehow. But the Court would not immediately decide how; for it remembered that (as it had said at an earlier stage) litigation between States has a quasi-international character, and it is much better that States should be guided by their own sense of right and honour to do that which the justice of the case, as finally determined by the Court, requires. Accordingly, there was a further adjournment; and now, Prof. Smith informs us, West Virginia has passed an Act providing for the extinction of the debt.

Some of those who have demanded (and so far, we think, rightly) a strong judicial tribunal as part of the institutions to be established under the League of Nations, appear to expect that the new Court will not only be above the temptation of mere arbitrators to make awards partaking of compromise, but will command and exercise powers of execution as prompt and effectual as those of national judges. Consideration of the case of *Virginia* v. *West Virginia* may lead to more moderate expectations. Whatever authorities may be formally created, a controversy between States cannot be dealt with like an action on a charterparty.

The first thing needful is a standing body of competent persons having recognised authority to declare the law. Their decisions are at the very least not less likely to be respected than the awards of arbitrators, and the cases of refusal to abide by such an award have been very few. We are familiar in municipal justice, no doubt, with obstinate litigants or debtors whom all the judges in the world will not convince that they are wrong, and who submit to an adverse judgment only after exhausting all means of evasion and delay. Some governments may be of the same temper, and the International Court of Justice may perhaps have in some such case to be as patient as was the Supreme Court at Washington in the case of *Virginia* v. *West Virginia*, or as the Allied and Associated Powers have been in enforcing the Treaty of Versailles.

It is further to be observed that in many cases of inter-state controversies there may be no need for any one to take active steps for satisfying the judgment in substance. Especially is this so where the decision in a boundary dispute confirms the existing possession, of which we have American examples: there may, indeed, and probably will, be minor consequential matters to be attended to (as, in that class of cases, setting out the metes and bounds by authentic marks); but for such matters promptitude is not essential, and it may well be that not many persons will ever know or care when they are formally completed.

Under the combined operation of Articles 14 and 15 of the Covenant, the Court of the League of Nations may be called on to give a judicial opinion, in answer to a reference from the Council or the Assembly, on some dispute, or legal point incidental thereto, which the parties themselves have not brought into court. In such a case the opinion of the Court will be only advice given to the Council or the Assembly, as the case may be, and the Court will not be concerned with the means of giving effect to it.

On the whole I cannot agree with Prof. Smith's opinion (written before the text of the Covenant was accessible) that "the problem of ensuring compliance with decrees" of the Court must be explicitly provided for. Still less can I

think with him that "the judgments of the Court will not command general assent unless it administers a definite and written system of international law" to be settled and agreed on by all the members of the League. The Supreme Court of the United States has done well enough without any such system, and so has the Judicial Committee of the Privy Council. Prof. Smith has good opportunities at Montreal of learning whether Canada would prefer the Judicial Committee to be tied down to some letter more elaborate than the Confederation Act. In point of fact waiting for a complete code might postpone the effective jurisdiction of the Court for an indefinite time: surely our learned friend is too young to be living in the dreamland of the last generation, when ingenious persons, lacking practical experience of either politics or law, talked glibly of "reform and codification of the law of nations" as a matter no harder than making rules for a club (not that the solution of that domestic problem always does much credit to the draftsman). The desired code would be of no use in questions on the construction of particular treaties and conventions, nor in cases of the first impression, like that of the Bering Sea fishery; while the general rules as to national property rights in time of peace are as well settled as most unwritten law past and present. In almost all international disputes the real trouble has been with the facts.

I will end, however, by quoting some sentences from Prof. Smith's conclusions with which I do heartily agree. "The real value of good courts is that they develop the habit of peaceful settlement at the expense of the habit of fighting. . . . If any international court which may be established is such as to command the confidence of the nations concerned, it will, as time goes on, be entrusted more and more frequently with the solution of international controversies . . . every decision that is acknowledged to be just, and every instance of ready compliance, will help to make smooth the way toward the establishment of the ideal, which is nothing less than the rule of justice in international affairs."

FREDERICK POLLOCK.

International Law. A Treatise. By L. Oppenheim. Third Edition, by Ronald F. Roxburgh. Vol. I. 8vo. pp. xlvi., 800. 1920. London: Longmans, Green & Co. (36*s.* net.)

The new edition of the late Prof. Oppenheim's treatise on international law, of which this is the first volume, is of very special interest, being the first to appear since the war broke out. The author himself carried out the revision of the work, though for the most part only in the form of notes, down to July 1919, when he was attacked by the illness of which he died in the following October. To continue the revision and to edit the work in these circumstances involved a very difficult and responsible task, the harder, too, on account of the execution of important parts of the Peace Treaties being still very much in suspense. Fortunately in Mr. Roxburgh the publishers found one who was most familiar with the author's method of thought and of work, and who was otherwise singularly competent for the work which was to be taken in hand. The first volume, which we are now considering, and which is on international law in time of peace, does not present so many problems as the second, which

is on the law in time of war; but account has had to be taken in it of the very considerable extensions of international law which have recently been made by the Peace Treaties and otherwise, and more particularly of the new departure which has been instituted by the Covenant of the League of Nations. The Covenant is dealt with in a special chapter which, it seems, was written by the late Professor himself. The great change which has been effected by the Covenant is, we are there told, that it has converted the family of nations from an unorganised into an organised body. Previously, it is said, this family could not exercise any functions nor devote itself to any task; now by the League it has become an international person capable of acting, of acquiring rights, and of being made subject to duties. What kind of international person is it? It is not, according to the author, an alliance or a confederation of States, or by itself a State, or in the germ a super-State. At the same time he recognises that it may exercise sovereign rights over territories not under the sovereignty of any State (*e. g.* Saar Basin), may exercise a protectorate over a weak State (*e. g.* Danzig), may declare war and make peace, and perform other political functions. The conclusion arrived at is that the League is an international person *sui generis*, existing alongside and in co-operation with other international persons who are sovereign States. Anything like a super-State is regarded as an impossibility. International law, though positive law, must depend on an equilibrium or balance of power between States; if a single State becomes predominant it ceases to work. As to the future prospects of the League, a sanguine view is taken, though what are considered to be grave defects in its present constitution are pointed out. These, however, it is to be expected, will be gradually removed, and important States who are not members of the League will become so.

The objection sometimes made to the constitution that it offends against the principle of equality of States, is not admitted, it being pointed out that such equality is not political, but only legal, and that as the burden of enforcing the Covenant must fall principally on the Great Powers, it is fair that they should have a superior voice in directing its affairs. One real objection to the Covenant in the author's opinion is that it makes no provision for the compulsory settlement of disputes by the Permanent Court if other means fail. The co-operation of nations for other than political purposes is briefly summarised in this volume. It cannot, of course, be expected that a general treatise of this kind should do this except in very general terms. Otherwise it would have become far too cumbrous; it has, indeed, already reached its extreme limit of size.

The bibliographical notices at the head of each chapter have always been recognised as a distinctive feature of the book, and the author took excessive pains in keeping them up to date. The additions made to them in this edition are not considerable, partly perhaps on account of the difficulty of access to foreign publications since the war broke out. They must, of course, be kept within bounds, but it is to be hoped that in future editions these lists will be kept up to date.

E. A. Whittuck.

Le Droit International Public Positif, par J. De Louter, Professeur de Droit International Public à L'Université D'Utrecht. Vol. I. pp. xii., 576, Vol. II. pp. vi., 509. 1920. Oxford University Press. (22*s.* net.)

The original work of which this is a new edition, was written by Prof. De Louter in the Dutch language and was published in 1910. Under the auspices of the Carnegie Endowment for International Peace, he undertook this French edition, and was engaged upon it when war broke out in 1914. Although, as he mentions in his preface, his first conclusion was that the outbreak of war meant an end to the project, he was prevailed upon to continue his task with a view to presenting a faithful picture of positive international law as existing at the moment when it was put to the test. On first consideration it appears strange to have a treatise on international law published in 1920 which ignores the happenings since 1914; but a perusal of the work shows that the task was well worth doing.

The author has brought to his task an extensive and deep knowledge of the history of the subject and of its literature, and his treatment of it has all the greater value because he deals purely with positive international law. He declares himself a convinced adherent of the positive school, treating international law as a branch of juridical science and in no sense of philosophy or morals.

In his discussion of general principles he insists, with emphasis, upon the principle of State sovereignty, and finds the true sanction of international law in the free will of States. But the insistence upon the free will of States does not, in the writer's opinion, lessen the binding force of international law.

Although on the whole he is optimistic as to the future, he sees no immediate hope of the abolition of war. It would have been of interest to have had his views on the League of Nations as an attempt at a "*union des forces de tous*" to prevent the universal calamity of war. He considers that at the present stage of development of society, a state of universal peace could only be obtained by the domination of a "world State," and such a domination he regards as "the grave of political liberty, the grave of humanity itself." To those who place their hopes upon arbitration he points out that, for the most part, the conflicts which give rise to wars are not disputes which can be solved by legal means, but conflicts of interests, which are not susceptible of a legal decision, such as the possession or extension of territory, external or internal independence, interests of race or nationality. At the same time, the author, in an excellent historical survey of the progress of arbitration, recognises the important part which it has played in the settlement of international disputes.

The rules of warfare as recognised prior to the late war are dealt with at length. The author adopts Rousseau's principle that war is a relation of State to State, not of individual to individual. Accordingly, he holds that the right of capture of private property at sea, although easy to explain historically, is not legally justifiable. While he comes to this conclusion, the fairness with which he states the opposing view is a good example of the judicial method which throughout is characteristic of his treatment of the various topics.

It is impossible to refer to all the noteworthy features in the book, but mention may be made of the interesting account of the contributions of the various countries to the literature of the subject since 1815 (Vol. I. pp. 124–159), and of the exhaustive chapter on treaties (Vol. I. pp. 462–576). It is unfortunate that the value of this work as a book of reference is marred by the absence of an index.

RODERICK M. NICOL.

A Treatise on International Law, with an Introductory Essay on the Definition and Nature of the Laws of Human Conduct. By Roland R. Foulke. 2 vols. Vol. I. pp. 482, lxxxviii. Vol. II. pp. 518, lxxxviii. 1920. Philadelphia: The John C. Winston Co. ($15.)

This book is written by a member of the Philadelphia bar. The arrangement of its subject matter is peculiar. Part I contains Preliminary Matter, Part II, Substantive International Law, and Part III, Remedial International Law; Part IV is a Table of International Persons down to 1914, and has no definite date for its beginning, which accounts for the inclusion of Rome and Normandy, but not for the exclusion of Carthage or Greenland. The division into Substantive and Remedial Law has awkward results; for while Neutrality is placed under Remedial Law and sandwiched between War and the Conduct of Hostilities, Blockade and Contraband are not treated under Neutrality, but under another chapter on War; and the test for distinguishing between enemy and neutral character is in a separate chapter at the end of Part III.

The preface states that the object of the book is an "attempt to clear away some of the many obscurities and misconceptions which pervade the subject of international law." Unfortunately performance falls considerably short of promise. Some of the difficulties, familiar to all jurists, are not so much as mentioned; others are raised, but left unsolved; and others are so treated as to make the reader regret that they were handled at all. Nor is the definition of international law (framed after rejecting some thirty definitions of other authors, any one of which is less abstruse than Mr. Foulke's) at all clear (§ 108).

Aerial jurisdiction is dismissed in ten lines of the text (§ 224), with a number of references in a note which does not include the Convention for the Regulation of Aerial Navigation, 1919. As to aerial forces in time of war, § 751 states that the question will be discussed later, but, except for passing references (Vol. II. pp. 248, 261 *n.*), we are finally told that they "require no particular comment" (Vol. II. p. 272). Wireless telegraphy (not indexed) is passed over with the remark that it is still in its infancy (§ 302), but reference might have been made to the International Radio-telegraphic Convention, 1912, signed by thirty Powers, including the U.S.A. Article 284 of the Treaty of Peace with Germany should have put the author on his inquiry as to this, even if he had no other source of information. No question, he says, has arisen as to submarine cables, except as to their use in time of war. But why is nothing said of the International Convention for the Protection of Submarine Telegraph Cables, 1884, to which the U.S.A. and over a score of other States were parties? A bad omission in the Index leaves the reader to trace for himself § 890 entitled, "Submarine Cables," where examples are given of cutting such cables in time of war. Even here no mention is made of the cutting of the British cable near Fanning Island by the Germans during the recent war.

There is no Index reference to "Canals," though § 226 is thus headed, nor does the reader get any solution of the controversy between the U.S.A. and Great Britain as to the Panama Canal; he is referred to other books, and that is all.

Poison gas, as a mode of warfare, is also not indexed; but the omission is of small moment, for what is said in the text consists of about two lines (Vol. II.

pp. 248, 261 *n.*, 272). This weapon and flames receive the remarkable comment that they "will be found to be much less deadly and inhumane than has been supposed by the civilian population viewing the hostilities from a distance." Will Mr. Foulke consult any medical officer who treated cases of bad gas-poisoning, and read J. W. Garner's *International Law and the World War* (Vol. I. § 181), and see whether he still adheres to an opinion which we trust is due only to lack of inquiry?

The question of what supplies of fuel may be given in a neutral port to a belligerent ship was apparently not worth considering, for it is neither asked nor answered. And any student hungry for a discussion of the problems occurring in the law of blockade during the recent war is fobbed off with a reference to Mr. Garner's article in the *American Journal of International Law*. We know that the League of Nations is not wholly popular across the Atlantic, but does this justify an international lawyer in ignoring it, except for a list of articles that others have written about it?

Minor errors in the text are not to be harped upon by a reviewer, but it is careless proof-reading that leaves Montesquieu persistently misspelt, and misquotes Twiss as talking of things "*anticipiis usus.*" It is something worse than that which reproduces "*jus postliminium,*" repeated in at least five editions of another American author, from whom it is quoted.

It has been hinted that the Index (which is 88 pages in length) needs improvement. It gives a list of over 200 authors as being cited, but ignores the existence of Bonfils, Despagnet, Rivier, Fiore, Ullmann and Mérignhac.

Perhaps the book may be of some use as an incomplete index to the literature of international law. What other purpose it can serve that is not attained much better in the standard works, we cannot say. To quote the preface again, "the author does not pretend to have any more than scraped the surface." We agree.

PERCY H. WINFIELD.

Le Droit des Gens moderne. By Marcel Moye. 1920. Paris: Librairie de la Société du Recueil Sirey. 8vo. pp. 480 (15 francs).

Professor Moye, of the University of Montpellier, has written a book which, in the sub-title, is described as "Précis élémentaire à l'usage des Étudiants des Facultés de Droit," but in his Introduction the author has in mind a wider range of readers. For all classes M. Moye's book is likely to be of much use. The author does not go into minute details, but confines his treatment to a broad outline of the subject, in which the positive standpoint is adopted. He hopes for much from the League of Nations, even for its becoming "un gouvernement des gouvernements." The tenacity with which States cling to the assertion of the doctrine of independence, constitutes, in the opinion of the author, an obstacle to the more complete reorganisation of the States of the world.

The book is written in an interesting and stimulating way, but there are a number of slips which ought not to have passed, *e. g.* "Albert" the Great for "Alfred" (p. 87); the date of Solferino is given as 1860, instead of 1859; the Prize Court Convention was not prepared at the Naval Conference of London in 1908–9 (p. 444), but at the Hague in 1907.

A. PEARCE HIGGINS.

Letters to "The Times" upon War and Neutrality (1881–1920), *with some Commentary.* By Sir Thomas Erskine Holland, K.C., D.C.L., F.B.A. 3rd edition. 1921. London: Longmans, Green and Co. 8vo. pp. xv., 215. (10/6 net.)

In his Preface to this edition of his Letters to *The Times* the Doyen of English international lawyers refers to it as "this doubtless final edition": we can only express the hope that this will not be so. Professor Sir Thomas Erskine Holland has exercised, through the medium of his valuable letters, an important influence on public opinion, in instructing a nation which, notwithstanding its world-wide commitments, makes singularly poor provision for the education of its people in the principles of the Law of Nations.

The Letters since 1914 are comparatively few in number, but they are of the same clear and concise character as those which were in the earlier editions, and which are also in the present one. The writer of these Letters has the rare gift of being able to seize on the salient point or points of an international problem, and of expounding the law applicable in language which all can understand.

Writing on the Sixth Hague Convention, 1907, relative to the position of enemy ships in port at the outbreak of war, and of the "desirability" of giving them days of grace, the writer, in a letter of Apr. 7, 1917, says: "It might perhaps be argued that our own Prize Court might well have refrained from treating this section as if it were obligatory, and have founded its decisions rather upon international law, as supplemented by a non-obligatory custom" (p. 49). This was what, in effect, was done by Sir Henry Duke in the case of the *Marie Leonhardt*, in which he held that the Convention was not obligatory on Great Britain in the circumstances. The use of the term "Piracy" to designate the German submarine activities is deprecated (p. 50), but it is pointed out that in so doing the writer was "far from stating, as a general rule, that Government authority exempts all who act under it from penal consequences." The short commentary on the case of the *Appam* is incomplete, and there is a misprint in the last line, where "Convention VIII." should read "Convention XIII." The American District Court held that the case was governed by Articles 21 and 22 of the Thirteenth Hague Convention, 1907, and not by the Prussian-American Treaty; and the United States Supreme Court affirmed the decision. Professor Holland's views on the Declaration of London, and especially on the attempt to carry out its provisions during the late war, are expressed in emphatic language. His call for its consignment by ourselves and our Allies to oblivion was made in December 1915; but more than eighteen months elapsed before it was responded to by the Maritime Rights Order in Council, July 7, 1917.

This book is one which every international lawyer will keep at hand for reference, for, as the writer says: "Not a few of these questions are sure again to come to the front as soon as the rehabilitation of international law, rendered necessary by the conduct of that [*i. e.* the late] war, shall be seriously taken in hand."

A. Pearce Higgins.

Völkermord oder Völkerbund. By Heinrich Lammasch. 1920. The Hague: Nijhoff. 8vo. pp. 128. (10–).

This little book was the last work written by Dr. Lammasch, the well-known Austrian publicist and statesman.[1] In it he reviews the problem of peace and international law in the light of the Great War and with the Covenant of the League open before him. He argues, as others have done, that the alternative to a real League of Nations will be the death or ruin of national civilisation. His argument is forcibly and concisely expressed. He discusses the main function of a League and the minimum obligations it must impose on the world of nations. It is the second part of his book which has practical value at present, for in it he examines the outlines of the constitution which the League of Nations should have if it is to prevent war.

Dr. Lammasch criticises much in the Covenant, but not in a hostile spirit. His view is—and there are few people who will disagree with him—that the Council and Assembly of the League are bodies ill adapted to settle international disputes. He examines in detail the problem of constituting bodies which will inspire confidence in the parties to a dispute and in the world generally by their capacity and impartiality. The most interesting pages are those in which he deals with the vexed question of a body which will settle non-justiciable disputes. He proposes a scheme which is rather too complicated —it requires two independent "Councils of Conciliation"—but which repays careful study.

LEONARD WOOLF.

La Chine et la Grande Guerre Européenne au point de vue du droit international. By Dr. Nagao Ariga. With a Preface by Mr. Paul Fauchille. 1 vol. in 8vo. pp. 342. 1920. Paris: Pédone.

The object of this book is to relate the measures taken by the Chinese Government from August, 1914, to January, 1919, to cope with the various problems of international law that had arisen in China in consequence of the Great War.

If some of these problems were similar to those that other Powers had also to settle, others, on the contrary, had a peculiar character due to the special status of China in her relations with foreigners. Thus, the existence in this country of leased territories, of foreign settlements, of consular jurisdiction, of foreign troops, etc., could not but increase her difficulties and complicate her position during the war by sometimes raising questions then unknown to international law. Dr. Ariga, in reproducing numerous documents, many of which have never been published, shows clearly how China had scrupulously applied the law of nations, first, during the particularly embarrassing period of her neutrality, then when she broke off diplomatic relations with Germany; and finally after she had declared war upon the Central Empires.

Nobody is more qualified to make a study of this kind than the author himself, who holds the post of legal adviser to the President of the Chinese Republic, and has already published several books on wars in the Far East from the point of view of international law.

CHI-TSAI HOO.

[1] For an obituary notice of him see *British Year Book of International Law*, Vol. I. (1920–21), p. 228.

Das Völkerrechtliche Delikt. By Dr. Karl Strupp. [*Handbuch des Völkerrechts*, Dritter Band, Erste Abteilung a. pp. xii., 223. 1920. Berlin, etc.: W. Kohlhammer.]

This monograph, published in the third volume of the *Handbuch des Völkerrechts*, edited by Dr. Stier Samlo, is a systematic exposition of the principles for determining the liability of one State to another on the ground of what in a general sense is called delict.

For it, of course, recognises that the civil law conception of delict is not applicable, except with considerable modification, to international law. The characteristics of inter-state liability are carefully considered in it.

In the course of the dissertation various subjects which have not been sufficiently explored present themselves for treatment, such as the degree and kind of negligence which make one State liable to another, the international responsibility of a State for the acts of its organs or of its subjects, and others.

The plea of necessity, which was frequently brought forward by the Germans in the late war, as when they excused themselves on this ground for over-running Belgium, is carefully examined by Dr. Strupp, as is also the subject of reprisals.

The paper, one need hardly say, is written throughout in a scientific spirit. We wish we had space on this occasion to discuss some of the conclusions it arrives at.

E. A. Whittuck.

Jahrbuch des Völkerrechts: Vols. V. VI. VII. 1919 and 1920. (Munich and Leipzig: Duncker and Humblot.)

Of the three volumes in the *Jahrbuch des Völkerrechts* which have been sent for review, two contain reprints of international documents relating to the war, and one contains a chronology of international events from 1914 to 1919. Volume V. is concerned with neutral States; and the documents are in French, English, Spanish and German. Particularly interesting is the diplomatic correspondence resulting from the sinking of the *Dresden* in Chilian territorial waters. The numerous documents gathered under the title "Switzerland" may afford useful guidance to the scrupulous neutral of the future in search of precedents. Volume VI. is devoted to the United States, and is divided into two parts, one containing documents relating to submarine warfare up to the time of America's entry into the war, the other, documents relating to the Peace negotiations. On page 280 is to be found President Wilson's message to Congress embodying the famous fourteen points (14 Punkte). The chronology in Volume VII. is a very full catalogue of events interesting from the point of view of international law.

Dewar Gibb

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Treaty of Peace (Hungary) Bill, 1921—Note on the. (Miscellaneous, No. 11, 1921.) [Cmd. 1236.] 1*d.* (1½*d.*).
— Treaty of Peace with Turkey—Signed at Sèvres, Aug. 10, 1920. (With Maps.) (Treaty Series, No. 11, 1920.) [Cmd. 964.] 3*s.* (3*s.* 4½*d.*).
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— Treaty of Peace between the Allied and Associated Powers and Germany, and other Treaty Engagements—Signed at Versailles, June 28, 1919; together with the Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace. 2*s.* 6*d.* (2*s.* 10*d.*).
— Treaty of Peace between the Allied and Associated Powers and Germany, the Protocol annexed thereto, the Agreement respecting the Military Occupation of the Territories of the Rhine, and the Treaty between France and Great Britain respecting Assistance to France in the event of unprovoked Aggression by Germany—Signed at Versailles, June 28, 1919. (With Maps.) 21*s.* (21*s.* 9*d.*).
STATUTORY RULES AND ORDERS.—Air Navigation. Order of the Secretary of State, Feb. 27, 1920, amending the Air Navigation Regulations, 1919. (1920, No. 383.)
— Air Navigation. Order of the Secretary of State, March 30, 1920, amending the Air Navigation Regulations, 1916. (1920, No. 541.)
— Alien. Order of the Secretary of State for the Home Department, May 20, 1920, under the Aliens Restriction Acts, 1914 and 1919, and the Aliens Order, 1920 (S.R. & O. 1920, No. 448). (1920, No. 801.)
— Alien. Naturalisation. The Naturalisation Regulations, Sept. 29, 1920. (1920, No. 1864.)
— Alien. Restrictions on Aliens. Order in Council, Nov. 9, 1920, amending the Aliens Order, 1920. (1920, No. 2262.)
— Alien. The Summary Jurisdiction (Aliens) Rules, May 17, 1920. (1920, No. 752. L. 22.)
— British Nationality and Status of Aliens. The British Nationality and Status of Aliens (India) Regulations, March 17, 1921. (1921, No. 528.)
— Copyright. The Treaties of Peace (Copyright) Rules, Nov. 29, 1920. 3*d.* (1920, No. 2246.)
— Foreign Jurisdiction. Orders in Council, China (Kashgar), March 11, 1920. 1*s.* 6*d.* (1*s.* 7*d.*). (1920, No. 568.)
— —— The China Order in Council, June 28, 1920. (1920, No. 1404.)

STATUTORY RULES AND ORDERS.—Foreign Jurisdiction. The China (Amendment) Order in Council, Aug. 13, 1920. (1920, No. 1843.)
— —— The China (Amendment) Order in Council, Dec. 21, 1920, No. 3, 1920. (1920, No. 787.)
— —— Draft of Instructions to be given to the Governor and Commander-in-Chief of the Uganda Protectorate, approved by His Majesty in Council, May 17, 1920. 3*d.* (4*d.*). (1920, No. 885.)
— —— The East Africa Order in Council, April 26, 1920. (1920, No. 824.)
— —— The Kenya Protectorate Order in Council, Aug. 13, 1920. 2*d.* (1920, No. 2343.)
— —— Order in Council, March 11, 1920: Western Samoa. 1*s.* 6*d.* (1*s.* 7*d.*). (1920, No. 569.)
— —— Order in Council, May 17, 1920, applying sec. 20 of the Finance Act, 1894, to the East Africa Protectorate. (1920, No. 883.)
— —— Order in Council, May 17, 1920: Uganda. 2*d.* (1920, No. 884.)
— —— Order in Council, Nov. 9, 1920: The Southern Rhodesia. 1*s.* 6*d.* (1*s.* 7*d.*). (1920, No. 2223.)
— —— Order in Council, Nov. 9, 1920: The Western Samoa (Amendment). (1920, No. 2224.)
— —— The Rhodesia (Administrator) Order in Council, March 9, 1921. (1921, No. 353.)
— —— The Tanganyika Order in Council, July 22, 1920. 4*d.* (5*d.*). (1920, No. 1583.)
— Fugitive Criminal. The Western Samoa (Fugitive Offenders) Order in Council, Oct. 13, 1920. (1920, No. 2079.)
— German Reparation (Recovery). Procedure. Supreme Court, England. The German Reparation (Recovery) Rules, April 4, 1921. (1921, No. 449. L. 4.)
— German Reparation (Recovery) Orders, April 7, 1921, made by the Board of Trade under the German Reparation (Recovery) Act, 1921:—
No. 1. (1921, No. 524.)
No. 2. (1921, No. 525.)
— German Reparation (Recovery) Order, April 15, 1921, made by the Board of Trade under the German Reparation (Recovery) Act, 1921. No. 3. (1921, No. 615.)
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— Also (1921, Nos. 677, 735, 770, 771, 772.)
— India. Rule, Nov. 23, 1920, made by the Secretary of State for India in Council under sec. 33 of the Government of India Act, 1919, relating to Transferred Subjects. (1920, No. 2245.)
— Kenya. The Kenya (Annexation) Order in Council, June 11, 1920. (1920, No. 2342.)
— Kenya Colony, and Foreign Jurisdiction. The Lakes Victoria and Kioga Navigation Order in Council, April 22, 1921. (1921, No. 763.)
— Patents, Designs, and Trade Marks. International Arrangements. Order in Council, Oct. 13, 1920, applying the provisions of sec. 91 of the Patents and Designs Act, 1907, as amended, as to Patents, Designs, and Trade Marks, to Roumania. (1920, No. 1992.)
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— Patents for Inventions. The Patents (Treaties of Peace—Austria and Bulgaria) Rules, Nov. 29, 1920. (1920, No. 2247.)
— Peace, Treaty of. Licence, June 24, 1920, of the Controller of the British Clearing Office, under sec. 1 (2) of the Treaty of Peace Order, 1919 (S.R. & O., 1919, No. 1517), as to Communication between Creditors and Debtors of British and German Nationality. (1920, No. 985.)
— —— Licence, Oct. 15, 1920, of the Administrator of Austrian Property under sec. 1 (ii) of the Treaty of Peace (Austria) Order, 1920 (S.R. & O., 1920, No. 1613), as to Communication between Creditors and Debtors of British and Austrian Nationality. (1920, No. 1937.)
— —— Order in Council, Aug. 13, 1920: The Treaty of Peace (Austria) Order, 1920. 6*d.* (7*d.*). (1920, No. 1613.)

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— —— The Egypt (Treaty of Peace) Order in Council, Jan. 22, 1920. (1920, No. 190.)
— —— The Egypt (Treaty of Peace, Austria) Order in Council, Oct. 13, 1920. (1920, No. 2082.)
— —— The Egypt (Treaty of Peace) Amendment Order in Council, March 25, 1920. (1920, No. 650.)
— —— India Treaty of Peace Order, June 28, 1920. 1*s.* 2*d.* (1*s.* 3*d.*). (1920, No. 1255.)
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— Peace Treaties * Treaty of Versailles with Germany. The Treaty of Peace (Amendment) (No. 2) Order, Nov. 9, 1920. (1920, No. 2461.)
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INDEX